SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS: CIVIL TERM PART 13

- -X

CLYDE ANDERSON and MAXINE ANDERSON, : Index 42821/97

Plaintiffs,

- against - :

THE AMERICAN TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, LIGGETT & MYERS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, TOBACCO INSTITUTE, INC. and THE COUNCIL FOR TOBACCO RESEARCH-USA., INC. :

Defendants. : Trial

- -X

Brooklyn, New York
May 16, 2000

BEFORE:

HONORABLE HERBERT KRAMER,
Justice

APPEARANCES: (Same as previously noted.)

ROBIN BATES
MICHAEL ISSACOFF
JUDY BRUSCA

SENIOR COURT REPORTERS

(Whereupon, the following took place in open court outside the presence of the jury.)

THE COURT: What are we doing about the juror?

MR. KACZYNSKI: We'll consent.

THE COURT: What are we doing about that juror.

MR. FINZ: Long as they consent we'll consent, Judge.

THE COURT: I take it I now have a consent. We will discharge that juror at the end of the day.

MR. MOLLON: Your Honor, as you recall on Friday during the cross-examination of Doctor Mark an article was used that he had authored which was previously marked as Exhibit A 4218 entitled "Mucoepidermoid Lung Tumors." At that time we indicated we would have a clean

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copy because the marked up copies were being used on the elmo and this is a clean copy I'm going to hand up.

THE COURT: Why are you handing it up? To who?

MR. MOLLON: There was no clean copy for the Court.

THE COURT: Is there a copy in evidence?

Was it offered into evidence?

MR. MOLLON: It was offered on Friday. I believe It had been admitted on Friday.

MR. LONDON: No, that's not so.

MR. FINZ: It was never admitted on Friday.

MR. MOLLON: Plaintiffs were going to look at it and decide.

MR. FINZ: We do not consent to it, Your Honor.

THE COURT: Sustained. Mark it for ID.

MR. LONDON: There is one other issue. Its certain exhibits we intend to use this morning. Given objections to every exhibit we offer we'd just like to save some time and go through them now. It's Exhibit 408, 1101, and 453.

THE COURT: 408?

MR. KACZYNSKI: 408 is open, Your Honor.

THE COURT: If 408 is open then make an appropriate showing.

What's 408?

MR. LONDON: That was a 1969 document offered by Wakeham for Philip Morris.

MR. KACZYNSKI: 1101 was not pre-designated for use with --

MR. LONDON: 1101 is --

THE COURT: 401, if it's marked open, you have to go through the appropriate predicate for offering that into evidence.

MR. LONDON: Other than that it's admitted.

THE COURT: I don't know what that means.

MR. LONDON: It's a pre '68 document and it goes to conspiracy.

MR. QUIGLEY: We have a number of options to that. I think we showed Your Honor --

THE COURT: Wait a minute. Wait a minute. 408.

MR. QUIGLEY: 408.

MR. LONDON: Your Honor, if I may just show you the document.

THE COURT: If it's marked open you have to go through the establishment of that as a record. If you can't get a consent then what you have to do is do what you have to do to get it into evidence.

MR. LONDON: There are rules.

THE COURT: There are rules.

MR. LONDON: You're taking these business records too far.

THE COURT: You think I'm taking it too

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far? You think I'm taking it further than the appellate division?
MR. LONDON: Yes, Judge. With all due respect these are documents --
THE COURT: You know, with all due respect, did you read People v. Kennedy that I cited?
MR. LONDON: No, I didn't.
THE COURT: After you read it we'll have a discussion on the law. Without reading that you're in no position. You've taken it too far. I cite you the cases and you don't read it and then you argue with me again.
With all due respect, counsel, your argument has no weight.
MR. KACZYNSKI: Your Honor, 408 is open. 1101 was not pre-designated.
MR. QUIGLEY: Can you ask Doctor Farone to step out while we have this discussion.
THE COURT: Yes.

(Whereupon, Doctor Farone was hereby excused.)
THE COURT: What else is a problem with 408?
MR. MOLLON: 408 is the document we were looking at yesterday which they attempted to offer into evidence. One, they designated it late, but more important, it's an unsigned updated document. It doesn't indicate where it's from or who wrote it.
THE COURT: I don't have a problem with that. None of that is relevant as long as it shoes to be a business record.
MR. MOLLON: No.
THE COURT: And it is shown that it is pre '69 or --
MR. FINZ: It refers to an event before 1969.
THE COURT: That was the second alternative. If it refers to an event before '69 then it is admissible after the preliminary establishment of a business record is made. And if they do not consent to the business record on this you know the

alternatives, that the plaintiff has to use it. He can use them.
MR. KACZYNSKI: Your Honor, I was wrong about 1101. 1101 was not pre-designated. For good reasons it was excluded by Your Honor.
THE COURT: Well --
MS. STEVENS: It was excluded because it contains tons of hearsay within hearsay and it's post '69.
MR. LONDON: Judge, 1101 is a Philip Morris document.
MR. KACZYNSKI: It' a post Philip -- it relates to pre '69 conduct.
MS. STEVENS: It's not a Philip Morris document. Let's correct the record first. We went through this exhibit.
THE COURT: I excluded. Why are you

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re-arguing?
MR. LONDON: Because you said I could if I could show it's pre '69. It's talking about the conspiracy before '69.
MS. STEVENS: Your Honor, if I can show you the quote they intend to use with the document. They know, Judge.

MR. KACZYNSKI: Refers to activity in 1970.
MS. STEVENS: Your Honor excluded it because it contained hearsay within hearsay within hearsay as our diagram reflects. It's four levels of hearsay.
THE COURT: That's all?
MR. FINZ: Your Honor, if they're all admissions by officers or agents of the company what is the difference? They all work for the company.
MR. KACZYNSKI: There is no admission because there is no conspiracy after 1969.
MR. LONDON: It relates to pre '69. The second paragraph on page two is pre '69. Conspiracy talking about gentlemen's agreement that they had not to do testing.
MR. FINZ: You will never find a smoking gun document.
THE COURT: Let's go, bring them in. You have to lay a foundation for this. I want a minute to read this one again.
What's the other number?
MS. STEVENS: 453 which is --

MR. KACZYNSKI: 453 is open.
THE COURT: If it's open you have to do what you have to do with it.
COURT OFFICER: Jury entering.
THE COURT: Good morning. Waited fifteen minutes for you again. Okay, let's go on.
(Witness entering.)
MR. FINZ: Shall I proceed, Your Honor?
THE COURT: Yes.

BY MR. FINZ:

Q. Good morning everybody.
Yesterday, Doctor, we finished with a question concerning one of the parts of the question concerning nitrosamines, the bad guys. You recall that?
A. Yes.
Q. Now, sir, picking up on that why wouldn't the bad guys or nitrosamines have been removed?
A. Well, technology that was available before 1960 for removing nitrosamines I pointed out extracted material from the cigarette. Took out the nitrosamines.
Also in the process of doing that took out the nicotine that was in the King Sano cigarette that I mentioned.
Q. What was the problem in taking out nicotine?

A. If you take out nicotine then people won't smoke the cigarette.
Q. Why wouldn't they smoke the cigarette if you took out the nicotine?
A. Because that's why people smoke cigarettes,

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is for the nicotine.
Q. What do you mean by that?
A. Nicotine is a drug that people obtain when they smoke a cigarette and that's the thing they smoke cigarettes for, to inhale that drug nicotine.
Q. What is the term that you give to it as a drug?
MR. QUIGLEY: Objection, Your Honor. Competency of this witness.
THE COURT: What's the question again.
(Record read.)
THE COURT: Overruled.
A. The person becomes addicted to using the nicotine. That's what people smoke for.
Q. Was this --
THE COURT: That's stricken.
MR. FINZ: On what basis, Judge?
THE COURT: Counsel, you don't do this in front of the jury.

MR. FINZ: Then I'll do it on the side of the jury.
Q. Sir, were you ever trained in nicotine?
A. Yes.
Q. Tell us when you were you trained in nicotine.
A. 1960 and times thereafter. 1960 in my senior year in college we took a course in national products chemistry which involved the study of all the alkoloids. Nicotine.
Q. What other alkoloids were there besides nicotine that you studied?
A. Cocaine, heroin, mescaline. All of the addictive and drugs that had been used by people over the years.
Q. Did you familiarize yourself with nicotine, sir?
A. Yes, I did.
Q. Did you read as a scientist, did you read the articles on nicotine?
A. Yes.
Q. Did you familiarize yourself with properties of nicotine?
A. Yes, I did.

Q. Did you also familiarize yourself with what nicotine did to the person with respect to addiction?
A. Yes, I did.
Q. Did you have that body of knowledge in 1960, sir?
A. Yes.
Q. Did you have it when you brought it into Philip Morris?
A. Yes. Long before Philip Morris.
Q. Do you have it today, sir?
A. Yes, I do.
MR. FINZ: May I ask the question, Your Honor?
MR. QUIGLEY: I object Your Honor. Witness is still not competent.
THE COURT: What I struck I still continue to strike.
Q. Sir, do you have an --

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THE COURT: One moment. Are you suggesting to this Court that the issue of addiction is within the purview of the training that you have had in physical chemistry?

THE WITNESS: Yes.

THE COURT: That's purely as a scientific basis?

THE WITNESS: Yes. We call it structure activity relationships where you relate the structure of the molecules to pharmacological affects. For example, whether they cause cancer, whether they can cure cancer. Whether they cause addiction, whether they don't, and at Philip Morris, for example, I participated in publishing papers on nicotine with regard to the molecular structure and the purpose of that research was to relate the structure to the addictive properties of nicotine.

THE COURT: Okay. Now ask the question.

Q. Do you have an opinion with a reasonable degree of scientific certainty as to whether or not nicotine is addictive?

MR. QUIGLEY: Objection, Your Honor. Competency of this witness.

THE COURT: Allowed.

A. Yes.

Q. What is that opinion?

A. Eighty-five percent of people who spoke become dependent upon nicotine, addicted to it.

THE COURT: Where do you get that percentage from?

THE WITNESS: It's the average from the 1995 Food and Drug Administration Report.

MR. KACZYNSKI: Objection, Your Honor. That was excluded from evidence in this case.

MR. QUIGLEY: I move to strike.

MR. KACZYNSKI: We had a motion in liminae on that, Your Honor.

THE COURT: Come up.

(Whereupon there was a side bar discussion held off the record.)

THE COURT: Jury is excused.

MR. QUIGLEY: Can Doctor Farone step out, please?

THE COURT: Yes.

(Whereupon, the jury and the witness was hereby excused.)

THE COURT: Now, counsel, I want to recount what has occurred and please correct me if I am wrong.

MR. FINZ: Shall I correct you as you say it, Judge, or shall I wait until you're concluded?

THE COURT: You may do it in any fashion you deem appropriate.

MR. FINZ: I would not want to do it in a disrespectful way.

THE COURT: Counsel, I don't want to do it in a disrespectful way either. I have the

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utmost respect for every attorney who appears in front of me, especially in this case where the level of competence is completely high except they don't read People v. Kennedy after I go through the trouble o of finding the exact cite for it.

MR. FINZ: May I interrupt at this point?

THE COURT: Absolutely.

MR. FINZ: May I suggest Your Honor that Your Honor has on more than one occasion made disparaging remarks in the presence of this jury, the record directed toward me. I think the record will reflect Your Honor that I'm probably one who has spoken the least other than just asking questions in this courtroom. I've been probably the one who has been the least intrusive or obstructive and then for Your Honor, in the presence of this jury, to

make the statement that you made to suggest that I as an officer of this court am doing something improper -- first of all, you accuse me of making a remark loud enough for this jury to hear. I say this most respectfully, Your Honor, that was a false statement on Your Honor's part.

THE COURT: Counsel, if you think that --

MR. FINZ: And I take umbrage at it.

THE COURT: Then there are other people in this courtroom and let's see what --

MR. FINZ: Other people in this courtroom? You mean the tobacco people? Those are the only other people in this courtroom.

THE COURT: I mean --

MR. FINZ: Other than my two clients here who are entitled to a fair trial and keep on saying that somehow Judge Kramer is making some remarks that they're upset about.

MR. QUIGLEY: Your Honor, if I may respond.

THE COURT: Counsel, they're not lawyers.

MR. FINZ: They are the clients, Your

Honor, and I have my obligation to them.

THE COURT: So are the tobacco companies clients.

Counsel, look, let's make this clear.

MR. FINZ: Yes, sir.

THE COURT: You have interrupted. I want -- this is not a fight between me and you.

MR. FINZ: Don't make it that, Your Honor.

THE COURT: Well, you're going to comply with the rules I have set as every other attorney.

MR. FINZ: I'll always do that, sir. I've always have.

THE COURT: Counsel, let's start. I'd like another comment from somebody else to see if -- and all of these people are officers of the same court.

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MR. FINZ: You're going to ask the tobacco people as to what was said and you're going to rely upon the validity and the credibility of what they said, Your Honor?

THE COURT: Counsel, I am going --

MR. FINZ: I don't think that's being very fair or objective.

THE COURT: I am going to spread this upon the record. You and I are not in an argument alone. Now, you have not given me the chance to put on the record yet what I am talking about.

MR. FINZ: We started this conversation --

THE COURT: You have not yet allowed me to put on the record why I have chastised you.

MR. FINZ: So the record should be clear you have chastised me, Judge. You just said it.

THE COURT: Counsel, you have not yet allowed me to put on the record. You not only haven't allowed me to do it but when I asked other people in this courtroom --

MR. FINZ: Only other people --

THE COURT: -- you didn't allow that to occur.

MR. FINZ: Only other people in this courtroom, Your Honor, in addition to the tobacco people are Mr. and Mrs. Anderson,

nobody else, and the record should reflect that so if you ask other people in this courtroom the record should reflect very carefully what their bias is, what their prejudice is, and what the level of credibility is, and now Your Honor I shall sit down.

THE COURT: Counsel, if you insist and you think that you are a victim here, then I'm going to stop the trial for a moment because I am going to regain control of this courtroom.

Now, if you want to have a hearing I will be glad to do it in addition to the people you call the tobacco companies and I that I call lawyers. I have my court reporter with whom you were talking and facing at the time as I was having a bench conference to clear up this snafu. You were not anywhere close to the bench. You were talking in a loud enough voice for the jury to hear.

MR. FINZ: That's absolutely not correct, Your Honor. Absolutely not correct. My conversation with the court reporter, and you can put the court reporter under oath, had

nothing to do with any issues in this case. I was merely passing a pleasantry to the court reporter.

THE COURT: When I called for your attention --

MR. FINZ: I can't get to close to that bench. There's no room.

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THE COURT: Wait a minute, folks. Let's establish a rule. We will allow Mr. Finz to get close to the bench so that we don't have this problem. The rest of you, and there are seventeen lawyers seated at counsels' table, and this is a very major problem. I have set aside a conference room for this and I haven't used it yet because this kind of situation did not occur, but if you think that this is -- that I am somehow discriminating against somebody then I will be most glad to use that but I was -- had some consideration of your position and did not wish to interrupt the flow of your trial witness.

Now I am waiting for someone to be heard.

MR. QUIGLEY: Your Honor, I also am an officer of the court and --

THE COURT: You're kidding.

MR. QUIGLEY: Your Honor, I think this is very serious as an officer of the court. First of all, no one blocked Mr. Finz' access to Your Honor's bench. Mr. London was standing in front of him, his own associate, but we certainly cleared the way and backed up. He's always had the opportunity, he has taken of it many times to get to the bench when he wanted to get to the bench.

Secondly, I heard Mr. Finz talking not to Your Honor, not to the court reporter, but looking at the jury, talking to the jury. I watched him toward the rear shrug his shoulders and make faces as Your Honor was talking to the jury. That is a regular pattern of practice that Mr. Finz has engaged in since the beginning of this trial when Your Honor is holding a bench conference. Mr. Finz plays up to the jury in that fashion. It's totally improper. I say that not as a so-called tobacco person but as an officer of this court.

THE COURT: Anybody else want to say

something?

MR. KACZYNSKI: Yes, Your Honor. Less the portion of Mr. Finz remarks that somehow suggests that this Court is continuously and unfairly chastising him in front of the jury I just want to point out that from voir dire, beginning with voir dire saying Big Tobacco -- the orders that Your Honor has put in place that were repeatedly violated, and there has been times when Mr. Finz was asking Doctor Feingold questions about warnings when Your Honor clearly excluded him from talking about warnings. This has been a pattern and Your Honor has certainly been within the bounds --

THE COURT: Part of this pattern is that Mr. Finz himself has not been at any of the conferences where any of the discussions and orders by the Court which having been memorialized in which everybody has a book of

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over a period of three years. I was loathed to think so but I would hope that it is not a deliberate pattern of ignoring this Court's previous order, and I continue to be an

optimist to think it was not. However, if you haven't got room will you ask me to use the conference room that we have set aside a great deal of expense to this court house and its facilities.

Now, can we get to the issue at hand? When I ask for a bench conference I will ask you not to talk to my court reporter. She is not for your conversation during the business portion of this trial, nor is anyone else and face me and not talk in a loud enough voice for the jury to hear it.

Very frankly, I don't care what your clients think of me or the proceeding. I have gone out of my way, and it's your obligation as a lawyer to explain to your clients that I have been fair, that I am applying the law as best I can whether or not you or they agree with it.

MR. FINZ: I beg your pardon, Your Honor? May I at this point?

THE COURT: Absolutely.

MR. FINZ: Thank you. First, if I may respond to some of the remarks first that were

made by Mr. Quigley. Mr. Quigley said that standing back there he sees that I am making faces. Well, if that be the case then there must be mirrors in this courtroom because it would be physically impossible for Mr. Quigley who is at one side of the room to see what my face is if I'm facing the jury. How he can possibly do that is miraculous but I do say this, Judge, that has never happened, not at any time. I haven't done it in this trial. I haven't done it in other trials and what Mr. Quigley says is absolutely false but I am not surprised by that falsehood. He's done that before. He'll continue to do that for the next four, five, six or seven weeks or maybe four, six, seven months if this trial continues the way it's going.

Number two, looking at the juror to make a remark, that I have intentionally looked at this jury to suggest to the jury anything at all is absolutely false. I resent it. Once again it is something to undermine the process and to pervert the process and to gain an advantage to the Court to assume that I am

doing something improper. I suggest it is a trick. It is a strategy they have used before. They've done it before. I am not going to sit still for it. The record should reflect that.

So far as my comment of Big Tobacco is concerned I did say Big Tobacco. That was an honest mistake on my part. I don't believe I

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ever said it since and I will never say it since unless it comes out instinctively. I assured the Court that was a mistake. I think everybody of any reasonableness recognized that it was a mistake and for this lawyer to come up, Mr. Kaczynski, to put that on the record as if I did something venal suggests to me that he is doing something improper. He's not acting the way that a lawyer should act with respect to that kind of very specious argument.

But let me go further. Your Honor suggested that I ignored the Court's order. Your Honor, not only have we attempted not to ignore the Court's order but we have been so attempting to go over board with the Court's

order that before we even bring the jury in we alert the Court as to what we intend to do for the morning so that Your Honor will not be surprise so that we can share with everyone whether or not what we intend to do is going to be admissible and acceptable. We are not grand standing in any way. We do that to give Your Honor the benefit of what it is we're going to do and we give the benefit to the other side so that they can, as professionals, argue the point. I think that's a fair approach and you'll probably find that very few attorneys acting in that particular way. I happen to do that because I think it's appropriate, I think it's right, I think it's professional, and I think it's courteous and I think it's keeping with my role as an officer of this court.

But let me go further, Your Honor, you had said something about you don't care whether or not my clients think they are getting a fair trial or not. I don't really believe that you really meant to say that. You, Your Honor, represent the pillar of

justice in this courtroom.

THE COURT: And you represent a translator of that.

MR. FINZ: I am not a translator of anything, Judge.

THE COURT: Yes, you are. Every lawyer is.

MR. FINZ: Judge --

THE COURT: Every lawyer has an ethical obligation.

MR. FINZ: I have my ethical obligation.

THE COURT: And your ethical obligation includes explaining the process to non-lawyers including your clients.

MR. FINZ: My role as a officer of this court is multi-factorial. My role is to --

MR. QUIGLEY: Note my objection to the record.

MR. FINZ: -- to administer to this court as an officer of the court, to comply with the rules of ethics, to comply with the

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administration of justice, to comply with my oath as an officer of this court, as a attorney, and as licensed counsel to practice

law in the State of New York which I do.

My additional role is to represent the best interests of Mr. and Mrs. Anderson to see that justice is served on their behalf.

THE COURT: And justice is being served in this courtroom.

MR. FINZ: Not when you keep on making those comments about me in the presence of this jury. That undermines me and when you undermine me you undermine the justice to which these people are entitled.

THE COURT: I heard all I intend to hear. You will comply with my directives and you will --

MR. FINZ: I act as an officer of this court. I give you my word on that.

THE COURT: That's what I'm looking for.

MR. FINZ: And I've done that and I will continue to do that as I've done it for the past 47, 48 years and as long as the good Lord will give me life to do it.

THE COURT: Can I get to the issue?

MS. STEVENS: Your Honor, we had a ruling on the motion in liminae on FDA reports that

says evidence of and reference to FDA efforts to regulate nicotine is specifically the report cited by the defendants together with certain statements recited by the defendant are in admissible as being irrelevant.

THE COURT: What order is it? What's the dates?

MS. STEVENS: The date is March 14.

THE COURT: That's a famous date.

MR. KACZYNSKI: Your Honor, the order goes on to say that should any party believe that there are relevant portions of these reports they may separately submit them for this Court's reconsideration and review which was not done.

THE COURT: I just want to know which of the March 14 --

MS. STEVENS: Your Honor, it starts with the --

THE COURT: I have so many of them for that day.

MS. STEVENS: It's number six.

THE COURT: That doesn't help me. I want it read. Part of an order I want to read.

This is part of one of the documents of March 14. Number three, no document which is currently barred may be introduced into evidence in its corrected state without a written motion on notice together with a complete list of all documents in the fashion ordered. No such motion will be entertained after March 29, 2000.

MR. LONDON: Your honor --

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THE COURT: This document here that you are seeking reconsideration on, on what date was that motion made?
MR. LONDON: Your Honor, with all due respect --
THE COUT: Yes.
MR. LONDON: -- that order you just read from has been vacated.
MR. QUIGLEY: By what?
MR. LONDON: By a short form order that the Court signed.
MR. QUIGLEY: Can we see a copy of it?
MR. LONDON: There's another order that apparently didn't make this book.
MR. QUIGLEY: We're not aware of it.

MR. LONDON: You certainly are. One of your colleagues drafted it.
THE COURT: I want to see it.
MR. LONDON: We made the motion before on or before March 29.
THE COURT: Can I see that order that you have read from, Ms. Stevens?
MS. STEVENS: I don't think they were seeking to introduce the FDA report. It was the reference to the FDA reports that we were objecting to which is also excluded.
(Handing.)
THE COURT: It's regulating nicotine.
MS. STEVENS: Your Honor, that's what he was referring to. That's wasn't dealt with in the report in this issue. He's relying on that for the proof of the statement of 85 percent. That's where that number comes from, from that exact report.
THE COURT: That's not pushing -- this is not about ethics to regulate nicotine, not quite the same. I will allow that testimony.
MR. SHEFFLER: Judge, I did have --
THE COURT: I'll deal with your

objection.
MR. SHEFFLER: First of all, if there is an order rescinding your order that you read about the documents --
THE COURT: That's nothing to do with this issue.
MR. SHEFFLER: It doesn't?
THE COURT: That has to do with the CPR issue. This document 1101 --
MR. SHEFFLER: And I've never seen such an order so I'd like Mr. London to produce it for us.
THE COURT: You haven't been here all that much either.
MR. SHEFFLER: My objection on this --
THE COURT: You're more interested in Florida.
MR. SHEFFLER: No, not at all. My objection is this: There was some discussion about whether or not warnings were admissible after 1969 with respect to the issue of addiction and the Court made the observation;

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that is, you can't have it both ways. You can't use it as a shield or as a sword but you

did make the observation that if indeed the door is opened by arguing about addiction post '69, which is what we're hearing now from a witness who is working in '76 or '77 or whenever it was --

THE COURT: I don't think he said that.

MR. SHEFFLER: I am replying upon his work for the basis of his expertise.

THE COURT: That's not the same thing.

MR. SHEFFLER: Is he going to be allowed to talk about addiction post '69?

THE COURT: No, not post '69 because then the issue of warnings come into play.

MS. STEVENS: The quote he was reading --

THE COURT: His quote does -- is allowed.

MR. LONDON: A text after 1969 is certainly relevant.

THE COURT: Then the warnings post '69.

MR. LONDON: We're not saying they should have warned --

MR. SHEFFLER: What is it relevant to?

MR. FINZ: It's relevant to the fact he had no further choice, that his free choice had been removed by the addiction qualities of

nicotine.

MR. LONDON: To say you can't offer evidence of nicotine after 1969 --

THE COURT: I had a ruling on that. We are not going to reargue that nicotine after 1969 -- I would ask to know where that ruling is. No evidence of nicotine being addictive after 1969? You're talking pre '69. I'm allowing it. Pre '69, post '69 what is it relevant to?

MR. LONDON: Defective design. No free choice.

THE COURT: There is no issue here of free choice after '69.

MR. FINZ: Of course there is, Judge.

THE COURT: You're inserting it? You want to insert it. Go ahead.

MR. LONDON: They improperly withdrawn comparative. We want free choice in the case. We want culpable conduct.

THE COURT: Did you re-allege a failure?

MR. LONDON: A failure?

THE COURT: Did you allege a failure? It's their burden. What do you mean? You

want their burden.

MR. LONDON: I don't know still to this day how they can withdraw their affirmative defense of comparative fault.

THE COURT: Did you object to it?

MR. LONDON: Yes, we did, Judge.

MR. QUIGLEY: And the Court ruled.

MR. LONDON: Exactly, and they're still arguing choice in the case.

THE COURT: They're not arguing choice.

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MR. LONDON: You watch the opening statement.
THE COURT: Did you object? Did you object?
MR. LONDON: We'll object throughout the rest of the trial. If you will look at the exhibit list we objected to documents.
THE COURT: Counsel, they made a motion to strike certain causes of action post '69, and as Mr. Sheffler said, when I granted that I brought -- I took away the issue of choice after '69. It may not be argued to the jury.
MR. LONDON: What about the nicotine in a cigarette, nicotine affect in a cigarette?

THE COURT: You know something, I find this extremely difficult. What I find difficult is I make rulings. They are re-argued ad infinitum.
MR. LONDON: Why didn't we send Clyde Anderson to a psychiatric IME for ten hours?
THE COURT: When was it done?
MR. LONDON: Two weeks ago.
THE COURT: Why was the order issued and at what point in relation to the summary judgment motion?
MR. KACZYNSKI: It was around the same time but the point is we sort the IME in response to the fact they had him interviewed by Feingold, Cumminings, and their oncologist in Boston so we opted Doctor Cummings cannot diagnosis with cancer.
MR. SHEFFLER: Discovery, Judge, is not the same thing as admission into evidence in a trial. If indeed there is testimony of post '69 about addiction they open the door and they want to talk about post '69 addiction of course we must -- Your Honor, it's a defense.
THE COURT: What is a defense?

MR. SHEFFLER: It's a defense to say what they are going to say about --
THE COURT: Wait a minute, you're talking in mysterious language.
MR. SHEFFLER: We did a lot of things. We made a lot of -- we've done -- got a lot of documents on your exhibit list. Of course we will not use the, It all depends upon what the plaintiff puts into evidence, upon what the Court rules goes into evidence, upon what they elicit from their witnesses because we rebut. We are defendants. We go second. We rebut what they say. Obviously the Court has made a ruling. We understand that ruling. They continue to reargue the ruling and, Judge, I have a fear that eventually they may wear you down. It could happen they are persistent.
THE COURT: You think they might and you won't, okay. We're on a short break.
MR. QUIGLEY: Your Honor, I object. I have one independent ground to object to the last question that what posed to Doctor

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Farone. They attempted to qualify him on a expert option addition based on one college course and the fact he did some molecular work with Philip Morris. I submit he is not qualified, Your Honor.

THE COURT: I believe that he is chemically qualified.

(Whereupon, there was a brief recess taken.)

* * *

COURT OFFICER: Jury entering.

THE COURT: We are going to have a little conversation, folks.

COURT CLERK: You may be seated.

THE COURT: Trials are not always without issue or incident. I have a job to do. Your job, as I have indicated to you earlier on, is to disregard what occurs in the courtroom between counsel and the Court. Anything outside of the evidence is not permitted to influence your judgment in this case. I have no opinion about the facts in this case. I'm trying my best to deal with a rather complex set of issues, very complex I assure you. I'm doing the best I can in the most reasonable and fair manner that I can and there are rules I have to make, but what is most important is that you disregard any colloquy between the Court and the attorneys, between the attorneys and each other because that's not what we're about. And the issues in this case are not about who smiles the most or smiles the least, but it's about the evidence presented on the witness stand.

Everybody join me?

THE JURY PANEL: Yes.

THE COURT: Proceed, counsel.

(Witness enters.)

BY MR. FINZ:

Q. Doctor Farone, before the recess we were talking about nicotine.

You have an opinion with a reasonable degree of scientific certainty as to whether or not nicotine was addictive, I think that was the question?

A. Yes.

Q. And your answer was?

A. Yes, it is.

Q. And sir, were you also asked the basis of your opinion, you recall that?

A. Yes.

Q. And you cited some article, correct?

A. Yes.

Q. Was that an authoritative article, sir?

A. Yes, it was.

Q. Now, sir, has nicotine -- by the way, has a cigarette in your studies and in your research been known by some other name?

A. Yes, two I can think of. One is a nicotine delivery device.

Q. Let's stop there. What is the meaning of --

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it's been called a nicotine delivery device?
MR. QUIGLEY: Objection, Your Honor. May we approach?
THE COURT: Yes.
(Whereupon there was a side bar discussion held off the record.)
THE COURT: Jury is excused.
COURT OFFICER: Doctor, why don't you wait outside.
THE COURT: No, I want the witness hear. When did this cigarette become known as a nicotine delivery device and when was it referred to you as such by a tobacco company?

THE WITNESS: By tobacco company?
THE COURT: Who else? Who else referred to you as -- when did you hear the reference nicotine delivery device?
THE WITNESS: 1967.
THE COURT: Where did you hear that?
THE WITNESS: Lieber Brothers.
MR. QUIGLEY: Doctor Farone, in what context did you, while working at Lieber Brothers hear a cigarette referred to as a nicotine delivery device?
THE WITNESS: By Doctor Edward Sincstor, toxicologist.
MR. QUIGLEY: Has he ever been employed by the tobacco industry?
THE WITNESS: No.
THE COURT: Why is this all relevant, counsel? Give me an offer of proof.
MR. FINZ: Because in essence, Your Honor, nicotine is a very important part of this case. Nicotine is an addictive drug and, in essence, the cigarette companies are selling nicotine and that's been part of the entire -- that's been part of the process.

THE COURT: You have anything else to say?
MR. FINZ: On that issue?
THE COURT: On that issue.
MR. FINZ: And also because of the design component as being a cigarette that sells nicotine that --
THE COURT: We are talking about the reference to the product as a nicotine delivery device which we said to him before '69 by a third parties which constitutes hearsay. Now, what is the point of this?
MR. FINZ: Well, Your Honor, it is not hearsay to this extent --
THE COURT: It is not hearsay? Let's review what is hearsay.
MR. FINZ: Hearsay is not a court statement. That's something being introduced to produce the truth of the statement itself.
THE COURT: What is this being used to prove?
MR. FINZ: What this is being introduced to demonstrate is that (a), he was familiar with what nicotine was. (B), when he was with

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Philip Morris he learned that nicotine was being referred to -- cigarettes were being referred to as nicotine.

THE COURT: Post '69.

MR. FINZ: I'm coming back to this.

THE COURT: Could care what he heard about when he was in Philip Morris post '69. It's not relevant.

MR. QUIGLEY: Your Honor --

MR. FINZ: We have to bring this back now, the knowledge that he had in 1969.

THE COURT: I'm not allowing it. Let's go on. Bring the jury in. We're going to do this quickly.

MR. QUIGLEY: Your Honor, can we move to strike --

THE COURT: I'm going to deal with that as soon as the jury comes in.

MR. FINZ: Excuse me, may I inquire further on that offer of proof, Your Honor? Just this one issue, nicotine delivery device?

THE COURT: Of course.

MR. FINZ: You may sit down, sir.

Sir, when you had studied nicotine --

prior to 1969 you said you studied nicotine, is that correct?

THE WITNESS: Yes.

MR. FINZ: Did you know that nicotine was being used in cigarettes?

THE WITNESS: Yes.

MR. FINZ: Did you study nicotine with respect to it's use in cigarettes as an alkoloid?

THE WITNESS: Yes.

MR. FINZ: When you heard the term nicotine delivery device, was this something that in any way was new to you with respect to the body of knowledge that you had concerning nicotine and cigarettes?

THE WITNESS: No, it wasn't.

MR. FINZ: Was not. Therefore, when you gave the answer it was a nicotine delivery device was this based solely upon what somebody told you, this person from Lieber Brothers or was it a combination of the body of information that you had learned as a scientist, as a student, and all the information that you had brought with you up

until 1967?

THE WITNESS: Yes, and it's an obvious fact.

MR. FINZ: An obvious fact to you as a scientist?

THE WITNESS: Yes.

THE COURT: Prior to 1967?

THE WITNESS: From 1969.

MR. FINZ: From 1960 on?

THE WITNESS: Yes.

MR. FINZ: So that your response was that I heard this term from doctor whoever his name

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was, you had the knowledge of what this --
THE WITNESS: He was simply -- he was pointing out the obvious that nicotine was a delivery device. We had other particles we were looking at. Like toothpaste is a flouride delivery device. It's just --
MR. FINZ: So the question is did you know this was a nicotine delivery device before you heard this from this gentleman?
THE WITNESS: Yes.
MR. FINZ: Thank you.
MR. QUIGLEY: Your Honor --

THE COURT: Counsel, sit down.
MR. QUIGLEY: Thank you.
THE COURT: Bring in the jury, please.
COURT OFFICER: Okay, jurors. Jury entering.
THE COURT: The last remark was stricken. Continue.

BY MR. FINZ:

Q. Now, sir, you joined Philip Morris in 1976 is that right, doctor?
A. That's right.
Q. Yesterday you said that the first year was an orientation for you to learn a lot of things that were going on with Philip Morris, the articles that were there within the Philip Morris library.
Do you recall that line of questioning, sir?
A. Yes, sir.
Q. Now, sir, did there come a time during that first year of your employment, 1976, when you had a conversation or discussion concerning any biological test results on a whole cigarette?
MR. QUIGLEY: Objection, Your Honor. Your Honor's order.
THE COURT: We're all right here.

A. Yes, several such discussions.
Q. Now, sir, what was one of the areas of your employment with Philip Morris when you joined them in 1976? Tell the jury, please.
A. I was hired for two purposes. One, as to develop safer cigarettes and the other was to help them diversify.
Q. Let's talk about developing a safer cigarette.
In order to develop a safer cigarette what, if anything, was it necessary for you to do in connection with biological testing of a whole cigarette? Tell us, please.
MR. QUIGLEY: Objection, Your Honor, and leading, and Your Honor's order.
THE COURT: What's the dates of that order?
MR. QUIGLEY: It's the order May 11, 2000. The order was issued, most recent order, Your Honor, issued --
THE COURT: That's preliminary. I'll allow it.
Go ahead.
Q. Now, in connection with biological testing

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of a whole cigarette did you have any conversation with anybody at Philip Morris?
A. Yes.
Q. With whom did you have a conversation, tell us, please?
A. In the first year was doctor --
Q. Keep your voice up so everybody can hear you.
A. Doctor Robert B. Seligman, Doctor Thomas.
Q. Who is Doctor Seligman?
A. Doctor Seligman was the vice president of Research and Development and the person I reported to.
Q. What did you ask him and what did he tell you?
A. I asked Doctor Seligman I had been searching for historical information on the relationship of the different products. For example, Malboro versus Merit. I wanted to see animal safety testing because I am used to seeing animal safety testing.
MR. QUIGLEY: I object. May we approach?
(Whereupon there was a side bar discussion held off the record.)
Q. What did you ask this vice president of

Research and Development at Philip Morris?
A.
THE COURT: Where with the biological tests?
THE WITNESS: Historical biological tests.
Q. What was the importance of that, sir, biological test of the whole cigarette?
A. Specifically animal safety test because the products will changed over the years and the question was how had these products changed, how is one product safer than another products. Is one product safer than another products. Where are the test results that show that.
Q. You're looking for test results.
A. Yes, I am.
Q. What did Doctor Seligman tell you?
MR. KACZYNSKI: Objection. Hearsay.
THE COURT: Only relevant as to Philip Morris pre '69.
Q. What did he tell you?
A. He told me I should consult with Doctor Tom Osdean because he was the director in charge of safety testing on cigarette.

Q. And did you then consult with Doctor Osdean?
A. I did.
Q. Where did this conversation take place?
A. There conversation took place in Doctor Osdean's office. I had a nice appointment. I made a appointment with him to go in and talk with him about it and we had an extensive conversation concerning safety test results.
I requested Doctor Osdean to show me some of the test results that he had supposedly in his files and he said he couldn't do that.
Q. Did he tell you why --
MR. QUIGLEY: Objection Your Honor.

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MR. KACZYNSKI: Objection, hearsay, Your Honor.
THE COURT: Only relevant to Philip Morris pre '69.
Go ahead.
A. So he told me that he could not tell me that for two reasons. The first reason was that there was a gentlemen's agreement among the companies --
THE COURT: Go ahead.
A. Not to test whole products, finished products, so there was a gentlemen's agreement between

the companies not to test those products. And the second reason was that they did not want to have those documents in their file.
MR. MOLLON: Objection, Your Honor. Move to strike. The witness is clearly testifying about what was happening in 1976. Your Honor's order is clear what he can testify about.
THE COURT: Counsel, counsel, I understand your objection. This is only relevant as against Philip Morris to the extent it reflects the state of events pre '69.
Proceed, counsel.
Q. What was the second reason he told you that you would not see any biological testing of a whole cigarette? Tell the jury, please.
A. Because they did not want to have those documents in their files in case of litigation. He also went to say, however, because I confronted him and I said look, if you don't do animal safety testing then you're using the customers as your guinea pig.
THE COURT: Sustained as to what you said. It's irrelevant.

Q. You told him something?
A. Correct.
Q. What did he respond.
A. He said I can provide you with the results of that research. We were doing it in any case in Europe and --
MR. MOLLON: Objection, Your Honor. Same basis.
THE COURT: We are doing it. Sustained.
Q. What else did he say?
THE COURT: Counsel -- I'm sorry jurors, you're excused.
(Whereupon, the jurors were excused and the following took place on the record.),
THE COURT: Go ask the questions. Like for the record we're dealing with a post '69 conversation which thus far is not differentiated between pre and post. Note the words, we were doing it in Europe.
MR. KACZYNSKI: Your Honor, just for the record as well for all these conversations pre/post, whenever I have a continuing objection on behalf of my client --
THE COURT: I have given the instruction

on how it's relevant. Hopefully you will

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remind me to do so in the continuity. Let's see what remains here.

MR. MANSFIELD: Is that a continuing objection with respect to each of the companies?

THE COURT: Fine. Let's go, counsel.

Q. Doctor, tell us about in great detail this conversation that you had at that time?

A. Doctor Osdean indicated that this --

THE COURT: Tell the jury.

A. That this agreement had been in agreement at the time he arrived at Philip Morris which was sometime --

THE COURT: Which was when?

THE WITNESS: 1964.

THE COURT: That's allowed.

A. And they had discussed it in the past and had discussed whether or not they should have some form of testing that would in essence violate the agreement in '68 that was brought up by Doctor Wakeham. That they would in fact test whole products and publish the results which would have been in violation of the agreement and they decided not to do that.

Q. Can you tell us what the agreement was?

A. It was a gentlemen's agreement, that is a non-written agreement between the cigarette company.

Q. To do what?

A. To, number one, not test each others products and publish the results. Number two --

THE COURT: Test each others product?

THE WITNESS: Their own and each others. Publish the product, finished product number, do not do animal safety testing inside their own companies. And there is a third point and --

Q. Not to do in-house animal testing?

A. I said that, and not to compete on the basis of safety.

Q. On the basis of?

A. Safety of the product. Do not make a claim that says Malboro is safer than Winston or Winston is safer than Marlboro.

Q. How long had this gentlemen's agreement been in place?

A. He indicated it had been in place since before he arrived there. He didn't know the date. '64

Q. That would make it around the period of '63,

'64?

A. Yes.

THE COURT: Is that this entire line of questioning?

MR. FINZ: There is some more.

Q. Did he tell you that he, Doctor Osdean, was receiving animal test results from whole cigarettes?

A. Yes.

Q. And did he tell you where he was receiving those tests results?

A. At his home.

THE COURT: That's out.

Q. Did he tell you what he was doing with those tests results once he received them?

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A. We'd review them, tell me what the results were but that he was destroying the documents that were being sent to him.
Q. So you asked for the actual documents to examine at that time as a scientist, is that right?
A. That's right.
THE COURT: That's all allowed because that's post '69 Philip Morris.
Q. For how long a period of time had he been destroying these documents? Was it before 1969?

A. I don't know.
Q. Did he say that was the practice that he had pursued?
A. The implication of the discussion he didn't give me dates.
THE COURT: Sustained.
A. This had been going on for a long time.
Q. Did he tell you it was going on for a long time?
A. It was a standard practice.
Q. How did you know it was a standard practice?
A. Because there were no results for any time period in any of the documents that I had reviewed. Not from 1950, not from 1960, and yet we know from other reports that were there that there are results, test results in the library and in -- there are plenty of test result in the files of Philip Morris concerning using animals. We saw one yesterday, 1961 document.
Q. But did ever see any test results with respect to the use of the whole products?
A. No, I never did. That was the whole point. So if they were done prior to 1969 they were all destroyed because not a single result existed that I could find.

THE COURT: In other words, you did search for those whole animal studies prior to '69, you found nothing?
THE WITNESS: Yes.
THE COURT: That I will allow.
MR. QUIGLEY: The absence of a document doesn't prove that it ever existed in the first place.
THE COURT: I agree but that's still legitimate proof.
MR. QUIGLEY: I also object to the whole line of questioning. Your Honor's order makes very clear that Doctor Farone will not be permitted to testify as to the conduct of Philip Morris or other Philip Morris employers during his tenure at Philip Morris which was post 1969. However, Doctor Farone will be permitted to discuss the state of the art in the industry post 1969. None of these questions have anything to do with the state of the industry post '69. It is an attempt to provide evidence to a fraudulent concealment post '69 which Your Honor's has already excluded.

THE COURT: I have limited the questions to that period, pre '69.

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MR. FINZ: Your Honor has also indicated in your order that you would permit him to testify with respect to ethics in science and with respect to ethics --

THE COURT: I haven't heard anything about that.

MR. FINZ: I'll go into that if Your Honor please.

THE COURT: Could you read back my ruling to the jury.

COURT OFFICER: Jury entering.

(Whereupon, the record was read back as requested and Robin Bates was relieved by Michael Issacoff.)

Q Sir, all the time that you were at Philip Morris and had all the articles, had you ever seen any final -- any testing, any biological testing of the whole cigarette any test results at all?

THE COURT: Sustained.

A No, I have not.

THE COURT: Sir, when I sustain --

THE WITNESS: I'm sorry.

THE COURT: I am here for a purpose.

THE WITNESS: I'm sorry, sir.

I didn't -- I didn't know what you were sustaining.

MR. QUIGLEY: Move to strike.

THE WITNESS: It was the same question I answered before.

THE COURT: No, it's not, and don't get into a discussion with me.

I am having enough problems.

Go ahead.

MR. FINZ: Can we have 408, please?

(Pause.)

MR. KACZYNSKI: The none PM defendants, I believe, have objections to the --

THE COURT: The jury will recall my

instruction.

The "A" company is only limited to them.

MR. RANDLES: I also have an objection relevant to relevance and dismissed claims.

THE COURT: First of all, you don't make those objections until a foundation is laid, counsel, right?

MR. RANDLES: Yes, Your Honor.

MR. FINZ: Okay?

Q Sir, I show you that document, which is 408, in evidence, and ask you whether or not --

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MR. QUIGLEY: Objection, Your Honor.
It is not in evidence.
MR. FINZ: For identification.
Q I show you 408, sir?
Would you take a look at that.
A Yes.
Q Have you seen that document before?
A Yes, I have.
Q When did you see it for the first time?
A In 1976.
THE COURT: May I have a copy of that document, folks?

Q Was that one of the documents that you had reviewed during your first year of your employment with Philip Morris?
A Yes.
Q Is this a document kept in the regular course of business of Philip Morris?
A Yes.
Q Is it the regular course of business for Philip Morris to keep it?
A Yes.
Q And sir, was this generated at the time of the event itself, to your knowledge?
MR. QUIGLEY: Objection, Your Honor.
Time frame?
MR. FINZ: May I address the Court's attention to page two?
THE COURT: No, counsel.
Establish when this was created, that's the question.
MR. FINZ: I am getting to that point.
THE COURT: When it was created and what they are talking about.
Q Do you know when it was created?
A My understanding, it was created some time

around 1968.
Q Thank you.
THE COURT: How did you get your understanding, sir?
THE WITNESS: From Doctor Wakem, who I think was the author of this document.
Q You --
THE COURT: You asked him directly.
THE WITNESS: He gave it to me as a part of the discussions which we were having on the kind of testing one should do.
THE COURT: Okay.
MR. FINZ: I offer it in evidence.
MR. QUIGLEY: Objection, Your Honor.
Foundation.
THE COURT: Go ahead, examine.
VOIR DIRE EXAMINATION
BY MR. QUIGLEY:
Q Doctor, does Doctor Wakem's's name appear anywhere on this document?
A Not that I can find.

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Q Is there any reference on this document as to who authored it?
A Not on the document.

Q Is there any reference on this document as to who it was sent to, if anyone?
A It was used as presentation, as I understand it, from Doctor Wakem.
Q Is there any reference on this document who it was sent to, if anyone, that was my question, sir?
A On the document?
Q Yes.
A Not on this surface of this document, no.
Q Is there any date anywhere on this document?
A I think there is.
MR. LONDON: Your Honor, may we approach?
THE COURT: Yes.
(Whereupon, a discussion was had off the record.)
(Whereupon, the following takes place on the record in open court:)
THE COURT: The jury is excused.
(Jury leaves courtroom.)
MR. LONDON: Judge, the agreement as I understood it yesterday, was all documents

would be business records unless to --
THE COURT: Not the open ones.
There is an open one.
MR. MOLLON: Furthermore --
THE COURT: Not the open ones.
MR. LONDON: Now defendants are continuing to object to every document so far offered.
MR. MOLLON: We object to the document.
MR. LONDON: As a --
MR. MOLLON: We object to the documents for which there are objections.
The Philip Morris documents were never reviewed during the process in April. They were the only ones not reviewed.
That's why there are a number of Philip Morris open because Mr. London and I could not agree how your rulings would apply to documents, and this is one of them, and I think it's obvious from the face of the document and the testimony that is not--
THE COURT: Where is the other document?
MR. QUIGLEY: You had it yesterday.

MR. LONDON: Guys, don't be so accusatory.
Exhibit 468 --648, I'm sorry.

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THE COURT: What's the status?
MS. STEVENS: Your Honor --
THE COURT: Wait a minute.
What is the status of 648?
MR. LONDON: If it says Philip Morris is a fuzzy company, I am sure it is in.
THE COURT: Mr. London --
MR. LONDON: It's open and it is objected to by them.
MR. MOLLON: 648 is not objected to.
Objection overruled.
It looks like a business record. We agreed it was a business record. So, they put it in.
There is no objection on the record and we never had an objection to it.
MR. LONDON: Are you talking about --
MR. MOLLON: I don't know what it talks about.
It is a business record.
MR. QUIGLEY: Your Honor, this is 648.

- Proceedings -
THE LAW SECRETARY: The text is saying --
MR. QUIGLEY: I think it's different.
THE COURT: I was looking at it.
MR. LONDON: 648 is a different document and --
THE COURT: Counsel, the only thing I don't want to hear from you anymore is that they object -- I don't care if they object to every document.
They have a right.
MR. LONDON: The documents that have already been ruled in?
THE COURT: If they want to do it, let them have a good time to preserve their objection.
If its ruled in as a presumed business record, than it is in.
MR. MOLLON: Just to clarify one thing --
THE COURT: Are you folks ready for a ruling?
I'm going to rule on this.
MR. QUIGLEY: Yes, Your Honor.

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THE COURT: 648 and 408, 408 appears to be a draft of 648 and I am going to allow both of them into the record.
MS. STEVENS: Your Honor, may I be heard?
THE COURT: And that will be over the objection of all counsel but with a limiting instruction as to its use only as against Philip Morris --
MS. STEVENS: May I be heard --
THE COURT: -- for a period prior to 1969.

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Yes.
MS. STEVENS: -- for two seconds?
I apologize.
The importance of the document that I think they seek to read against with statements like, Reynolds admitted.
It's really hearsay as to Reynolds and that I would ask that portion of the document be stricken.
THE COURT: I will direct -- first of all, I will prevent that reading because it is not attributable to you, in front of the

- Proceedings -
jury.
MS. STEVENS: Thank you, Your Honor.
MR. RANDLES: Your Honor, I would -- I have two objections to this document on behalf of my client.
The first is hearsay to the extent that the document purports to represent what all the companies said or thought and that's a specific statement --
THE COURT: Again, I am not admitting it against your company.
MR. RANDLES: The second objection, and this, I think, goes to confusion, this document, where it makes it difficult for every one because the document is not relevant because it is being offered pursuant to the dismissed claim, failure to test.
The purported gentleman's agreement --
THE COURT: I don't agree that is its only purpose.
Now may I have the jury?
MR. SHEFFLER: Can I note my objection on behalf of my client?

- Proceedings -
THE COURT: Of course.
MS. STEVENS: The document, it refers to an agreement that was prejudicial but not probative with respect to the claims against my client.
So therefore, I would object to the prejudicial nature of the document.
(Jury enters courtroom.)
THE COURT: Now, no one said you weren't going to get exercise.
THE CLERK: You may be seated.
THE COURT: Let me see if I could get the number.
Document 408 appears to be --
MR. QUIGLEY: Your Honor, there is no evidence of what it is or what it appears to be.
THE COURT: Im am reading from the document.
MR. QUIGLEY: But you are reading from the document is fine --

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THE COURT: Allow me --
MR. QUIGLEY: I have no objection to Your Honor reading from the document.

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THE COURT: I am reading from where it says, draft.
MR. QUIGLEY: Thank you, Your Honor.
THE COURT: Appears to be a draft of document 648.
The document 648 which is in evidence or is now in evidence was addressed to a Mr. Goldsmith from an H. Wakem, dated November 15, 1968.
The document 408 appears to be a draft.
There are some similarities, some changes, and I'm allowing them both into evidence for you to make on your own determination as to the efficacy of this evidence.
Understand, again, that this document is admitted against Philip Morris only prior to '69.
It is not relevant, and any references to statements by other defendants here in that, may be contained in either one of those documents, are to be excised and not a part of the evidence in this case and none of these documents are admissible as against

those other defendants.
Here, you are.
Let's go. Proceed.
Nor may -- nor may any portion relating to other companies be read now.

DIRECT EXAMINATION (CONT'D)
BY MR. FINZ:
Q Doctor, I'm going to ask you that you turn to page four of plaintiff's Exhibit 408 in evidence. Do you have that, sir?
A Yes, I do.
MR. FINZ: I'm going to ask Michael to put that in the machine, please, page four.
Flash it on the screen, please.
All right.
Michael, will you pick it up a little?
MS. STEVENS: Your Honor, may we approach on this?
THE COURT: Yes.
(Whereupon, a discussion was had off the record.)
(Whereupon, the following takes place on the record in open court:)
THE COURT: That part is not to be read

in front of the jury that is highlighted now.
MR. FINZ: I am reading what we have --

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THE COURT: No.
That's out. That portion may not be read to the jury, starting with the paragraph that's on the screen now.
Is there something else you want to discuss?
MS. STEVENS: No, thank you.
MR. FINZ: Why can't it be read, Judge?
THE COURT: Because I ruled.
MR. FINZ: Judge --
THE COURT: Counsel, I ruled.
(Pause.)
MR. FINZ: May I respectfully except to Your Honor's ruling as to that, please?
Would you put page two on, two, please.
(Pause.)
MR. FINZ: May we flash that on the screen, please?
THE COURT: Yes.
MR. FINZ: Okay.
Q Doctor, I'm going to read a certain portion

of that document, which is 408 in evidence about five lines down.
We see -- follow me?
A Yes.
Q Okay.
We see and anticipate as realistic and as a next step, the institution of a biological testing program on competitive brands for carcinogenic potentials and also for publication of these figures.
The technique for doing so is available.
Now, what does that mean, scientifically just what I read?
THE COURT: Sustained.
That's obvious.
Go ahead.
Q Now, in the language, the institution of a biological testing program on competitive brands for carcinogenic potential; what is the scientific meaning of that?
What does that mean, scientifically?
A That's is what I was looking for and that's why the document was important to me.
We're talking about doing animal tests and

competitive brands to rank them for their potential for causing cancer.
Q Was that ever done, to your knowledge?
MR. QUIGLEY: Objection, Your Honor.
Time frame.
THE COURT: Sustained.
Q Prior to 1969?
MR. QUIGLEY: Between the date of this document and '69, Your Honor?
THE COURT: Counsel, please don't interrupt in that fashion?.
Q Was this ever done prior to 1969, this

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biological testing?
A As far as I can determine, no.
Q Do you have an opinion as to whether or not it should have been done in order to make a safer cigarette?
Do you have such an opinion?
MR. QUIGLEY: Objection, Your Honor.
THE COURT: Sustained as to the form of the question.
Q Do you have an opinion with a reasonable degree of scientific certainly as to whether or not biological testing would have made it more

scientifically possible to have produced --
THE COURT: Sustained.
Let me ask.
Animal testing of the product we have been discussing, or rather, is animal testing of the kind we have been discussing an aid in scientific research towards a safer product.
THE WITNESS: In my opinion, it is absolutely essential, yes.
THE COURT: Go ahead. Next question.
Q Now sir, yesterday we were speaking about how to fix -- how to -- once you found the problems with the cigarettes, how to fix them.
Do you recall that?
A Yes.
Q You covered a certain number of areas of which I'm not going to repeat today.
Now, in addition to the areas that you covered yesterday as to how to fix the cigarette, was there something else that could have been done prior to 1966, based upon your research?
A Yes.
I mean, one thing we could do, as I

indicated that there are many additives that were put in cigarettes.
The additives could have been removed.
Q Aside from additives --
THE COURT: Wait a minute.
We are not repeating testimony. We have already covered that.
MR. FINZ: I am not going into additives, Judge.
Q Was there anything with respect to information that could have been imparted to the consumer?
A Yes.
Q Would you tell us that, please, prior to 1966, what could have been imparted?
MR. QUIGLEY: Objection Your Honor. Competency of this witness.
THE COURT: Overruled.
A The types of warning lables that we discussed for the use of consumer products could be placed on cigarette packs much earlier.

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Q And sir, to your knowledge, were any warnings at all placed on any cigarette packs prior to 1966?

A Not to my knowledge.
Q Now sir, there came a time when you left Philip Morris, is that right?
A That's correct.
Q Just very, very -- was your wife, by the way, also employed by Philip Morris?
A Yes, she was.
Q How long had she been employed by Philip Morris?
A 19 years.
Q And did there come a time when both you and your wife left Philip Morris at the same time?
A That's correct.
Q Were you terminated from Philip Morris?
A Yes, I was, 1984.
Q Very, very generally, without giving us the specifics, what was the overall --
A My wife and I had a disagreement with Philip Morris and we were terminated.
I was terminated and she resigned.
Q Now sir, assume that Mr. Clyde Anderson smoked Salem cigarettes from 1963, up until 1993, approximately 30 some odd years.
Will you assume that, sir?

A Yes.
Q Are you familiar with what Salem cigarettes contain in addition to the tobacco rods and the other things you mentioned yesterday?
A Yes I am.
Q What is it that it contains?
MR. KACZYNSKI: Objection.
Foundation, Your Honor.
THE COURT: How did you become aware of that?
Were you aware of the formulas for those cigarettes?
THE WITNESS: No.
The issue was menthol, I think.
THE COURT: I'm sorry.
THE WITNESS: Mine -- I have knowledge it was a menthol cigarette.
That was what I was -- Salem is a menthol cigarette.
THE COURT: That's all your talking about?
THE WITNESS: Yeah.
THE COURT: Go ahead.
Q Just on the issue of menthol, are you

familiar with menthol?
A Yes, I am.
Q As a scientist, sir, would you tell us,

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what is menthol?
A Menthol is an agent/chemical that's used to treat coughs.
It's in cough drops.
THE COURT: I am sorry?
I didn't hear that.
THE WITNESS: It's in cough drops as a cough suppressant.
It's used in some mouthwashes and some toothpastes on one of the basic things menthol does is prevents you from coughing.
Q From what?
A Coughing.
Soothes your throat so you don't cough. You can't expectorate as much as you would if you did not use menthol.
Q Was menthol used in Salem cigarettes?
A Yes, it was.
Q What was the purpose of that?
MR. KACZYNSKI: Objection.
Foundation.
Michael D. Isaacoff, OCR

Q Do you know the purpose of that?
THE COURT: I will allow that.
A Yes.
Q What was the purpose that menthol cigarettes were used in Salem cigarettes?
A Menthol is used --
Q Keep your voice up, please.
A Menthol is used to decrease the harshness of the product and make your throat anesthetized.
It's like putting an anesthetic on your throat to inhale more easily and inhale more smoke.
Q Is there any relationship between menthol and health hazards in cigarette smoking?
A In my opinion, there is a very strong relationship, because if you, normally, if you put something in your lungs that's not supposed to be there, you cough it up. You have mucous. You expectorate. You can remove that.
If you have something like menthol in a cigarette, then you have the product that your body naturally defenses.
MR. KACZYNSKI: I object and move to strike.
This is medical testimony.
Michael D. Isaacoff, OCR

THE COURT: Overruled.
THE WITNESS: Your defenses would be taken down.
It's like short circuiting the defenses that you normally have so you don't cough as much and you don't bring up as much of the carcinogens we talked about yesterday and other material that would get into your lungs.
Q And what happens when you don't have the natural defenses or the short circuit that you indicated before, what happens when that is removed

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by menthol with respect to the smoker -- with respect to a fellow like Clyde Anderson who's been smoking for 30 odd years?
A That increases the risk that the carcinogens stay in your lungs longer.
Q And if it stays in your lungs longer, sir?
A The chances --
THE COURT: No. No.
MR. FINZ: All right.
Q Sir, were you familiar with Parliament cigarettes?
A Yes.

Q In 1961, what it contained in 1961?
A Not the blend formula.
Tobacco, I was familiar with the cigarette.
Q Okay.
Did Parliament have the carcinogens in 1961 that we spoke of yesterday?
A Yes.
MR. QUIGLEY: Objection, Your Honor. Foundation.
THE COURT: Sustained.
Lay a foundation.
Q Sir, I --
MR. FINZ: I didn't hear that.
THE COURT: Lay a foundation.
MR. FINZ: All right.
Q Forgetting about the various, all the hundreds of chemicals that you discussed yesterday, basically, was the cigarette in 1961, Parliament, were you familiar with the cigarette in 1961 as it pertained to carcinogens?
A Yes.
I was familiar with the fact that carcinogens were contained in cigarette smoke of all cigarettes in 1961.

THE COURT: Including Parliament?
THE WITNESS: Including Parliament.
THE COURT: Okay. Go ahead.
MR. FINZ: Fine.
Q In addition to Parliament, did Kent contain carcinogens in 1961 such as you spoke of yesterday?
MR. RANDLES: Objection. Foundation.
THE COURT: I will allow that.
A Yes, it did.
Q And did Salem contain the carcinogens in 1961 that we spoke of yesterday?
A Yes, it did.
Q Now sir, did Parliament cigarette smoke in 1961 contain the carcinogens that you told us about yesterday?
A Yes.
Q The smoke --
A Yes.
MR. QUIGLEY: Objection.

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Foundation.
THE COURT: How was this determined by you, sir?

THE WITNESS: Determined by the literature, scientific literature.
Started graduate school in 1961.
THE COURT: Which you found authoritative?
THE WITNESS: Yes.
THE COURT: Go ahead.

Q Now sir, do you have an opinion with a reasonable degree of scientific certainty as to whether or not the Parliament cigarettes in 1961 were unreasonably dangerous to Clyde Anderson?
MR. QUIGLEY: Objection, Your Honor.
This witness is not competent to answer that question.
THE COURT: Overruled.
A Yes.
No cigarette with --
Q Excuse me.
You have an opinion, sir?
A Yes.
Q What is that opinion with respect to Parliament cigarettes, 1960, and Clyde Anderson?
MR. QUIGLEY: Objection.
THE COURT: Overruled.

A My opinion is that that cigarette was unreasonably hazardous.
Q And unreasonably dangerous?
A Unreasonably dangerous.
Q Sir, do you have -- did Kent cigarettes -- did Kent cigarette smoke, in 1961, contain the carcinogens that you told us about yesterday?
A Yes, it did.
MR. RANDLES: Objection.
Foundation.
THE COURT: Sustained.
Asked and answered earlier.
MR. FINZ: I am going to Kent the other was Parliament.
THE COURT: I thought I heard a Kent.
MR. FINZ: The other one was Parliament.
THE COURT: Counsel you will examine the record.
There is a reference to Kent in the same way.
Now, I will not allow you to repeat.
MR. FINZ: I just want to make the record--

THE COURT: Counsel, don't argue with me.
MR. FINZ: I am not arguing with you.

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I just want to make the record sure.
THE COURT: Counsel, sustained.
Let's try it again.
MR. FINZ: All right.
Well, in that case with the 5court's permission --
THE COURT: Don't have a conversation with me in the absence of any one else.
MR. FINZ: Could we have the record read back so I make sure it is covered, Your Honor.
THE COURT: We will have the record read back.
(Pause.)
THE COURT: Go ahead.
Yes. Absolutely.
MR. FINZ: Thank you, Your Honor.
THE COURT: I appreciate that.
MR. FINZ: Want me to approach first or should I just ask the question.
THE COURT: Just ask the question.

MR. FINZ: Fine.
Then I shall repeat the question.
THE COURT: Repeat what question?
MR. FINZ: The question that you sustained the objection to saying it was asked, Your Honor.
I just read it, I just had it read and it's not asked.
THE COURT: Okay.
Then you can ask it.
MR. FINZ: Thank you, Judge.
Q Sir, did Kent cigarettes smoke in 1961 contain the carcinogens that you told us about yesterday?
MR. RANDLES: Objection.
Foundation.
THE COURT: Overruled.
A Yes, it can.
Q Sir, do you have an opinion with a reasonable degree of scientific certainty as to whether or not Kent cigarettes in 1961 were unreasonably dangerous to Clyde Anderson in-
MR. RANDLES: Objection.
Q -- 1962, were unreasonably dangerous to

Clyde Anderson?
MR. RANDLES: Objection.
THE COURT: Overruled.
MR. RANDLES: Request --
Q Do you have such an opinion?
A Yes, I do.
MR. RANDLES: Could we approach?
Q Tell the jury, what is that opinion?
THE COURT: Yes.
MR. RANDLES: Thank you.
MR. FINZ: Excuse me?
(Whereupon, a discussion was had off

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the record.)
(Whereupon, the following takes place on the record in open court).
THE COURT: You may answer that last question.
A In my opinion, Kent cigarettes were unreasonably dangerous to Mr. Anderson in 1961.
Q What was the reason that it was unreasonably dangerous to Mr. Anderson in 1961, or 1962?
A Contained carcinogens.
MR. RANDLES: Same objection.

Q Sir --
THE COURT: Overruled.
Q Did Salem cigarette smoke in 1961 contain the carcinogens that you --
THE COURT: '61.
Q 1963, contain the carcinogens that you told us about yesterday?
MR. KACZYNSKI: Objection.
Vague.
THE COURT: Overruled.
A Yes, it did.
Q Do you have an opinion with a reasonable degree of scientific certainty as to whether or not Salem cigarettes in 1963 were unreasonably dangerous to Clyde Anderson?
MR. KACZYNSKI: Objection.
Invades the province of the jury.
THE COURT: Overruled.
A Yes, I do.
Q What is that opinion?
A Salem cigarettes were unreasonably dangerous.
Q To Clyde Anderson?
A To Clyde Anderson.

- Proceedings --
MR. FINZ: Thank you very much, sir.
I have nothing further.
Thank you.
MR. KACZYNSKI: Your Honor, we will need about five minutes to move some boxes.
THE COURT: Jury is on a break.
(Jury leaves courtroom.)
(Recess.)
MR. MANSFIELD: Your Honor, just before we bring in the jury, we wanted to make sure the record reflected the basis of our objection to Doctor Farone's conclusion with respect to Lorillard.
THE COURT: And can we add Philip Morris to that?
We don't have to repeat it a second time.
MR. MANSFIELD: I am happy to add Philip Morris and I know Reynolds made the objection.
THE COURT: Reynolds spoke to the

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grounds.
You have not had an opportunity.
Philip Morris had not had an

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opportunity, so I am taking your words for both.
Is that okay, Mr. Quigley?
MR. QUIGLEY: Yes.
Thank you. Thank you.
MR. MANSFIELD: Aside from the foundation which we did get on the record, we also object on the ground that it makes problems for the jury, in the discretion of the Court, to determine to allow experts to testify as to the ultimate issue in this case because the standard is so fact laid that it invades the province of the jury.
THE COURT: You see, Mr. Mansfield, so what you are objecting to is this time I utilized my discretion in favor of the plaintiff.
Is that your problem?
MR. MANSFIELD: No, Your Honor.
I'm objecting, given the specifics --
THE COURT: You see --
MR. MANSFIELD: -- in this context.
THE WITNESS: You seem to think that the -- the plaintiff thinks that the only

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time I rule is in favor of the defendants, and lo and behold, here, on a rather important issue, I exercised my discretion in favor of the plaintiff.
Now, how do you -- how do you equate that with my perceived unfairness.
MR. MANSFIELD: I am not analogizing this to a possession arrow.
THE COURT: What?
MR. MANSFIELD: To a possession arrow.
What I'm suggesting is, this specific opinion in this context, given what the jury charge will be, invades the province of the jury.
THE COURT: You have now made your record.
MR. MANSFIELD: Thank you.
THE COURT: My ruling stands.
COURT OFFICER: Ready, Judge?
THE COURT: Yeah.
COURT OFFICER: Jury entering.
(Jury enters courtroom.)
THE COURT: Oh, I see you have come equipped for the weather in the courtroom

Doctor Farone - Plaintiff - Cross/Kazcynski
today.
Okay.
You see, it was worse last week when it

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was too hot.
Counsel, you may inquire.
MR. KACZYNSKI: Thank you, Your Honor.
CROSS-EXAMINATION
BY MR. KACZYNSKI:
Q I guess it's good afternoon, ladies and gentlemen.
How are you.
Doctor Farone, we never met.
My name is Stephen Kaczynski and I represent R.J. Reynolds and I have got some questions for you this afternoon.
A Okay.
Q Doctor Farone, you worked, as I understand, in Philip Morris from 1976 to 1984?
A That's correct.
Q Prior to 1976, you did not work for any tobacco company; is that right?
A At a tobacco company, that's correct.
Q After 1984, you did not work at a tobacco company; is that correct?

A That is correct.
Q And during the time when you worked at Philip Morris, you were never involved in designing cigarettes in conjunction with anyone from R.J. Reynolds; were you?
A Not directly, no. Correct.
Q In fact, you have never been involved at designing cigarettes at R.J. Reynolds either?
A That's correct.
Q Because you never worked, at that time, at R.J. Reynolds?
A That's correct.
Q And you never worked with scientists -- strike that.
You never had any specific discussions with any scientists at R.J. Reynolds about designing cigarettes, did you?
A Only incidently at conferences I think we talked about, yeah.
Q And even at the conference, your employer discouraged you from discussing your work because of your confidentiality agreement; isn't that true?
A Details of the work, that's correct, but generalizations were okay.

We published papers and Reynolds published papers.
So, we could see what they were doing and they could see what we were doing.
Q In terms of confidential internal workings of Philip Morris, you were not to discuss those with Reynolds, and you didn't; did you?
A That's correct.
Q And on the other side of the picture, the Reynolds scientists did not come to you and discuss what they were doing in any amount of detail, did they?

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A Not directly with me, no.
Q No Reynolds scientist ever told you what they were working on, did they?
A Not myself, personally, that's correct.
Q And the reason for some degree of secrecy at Philip Morris, during the time you worked there, Philip Morris was very competitive with R.J. Reynolds; wasn't it?
A In some areas.
Q Certainly competitive in trying to get brand share away from Reynolds, weren't they?
A In marketing the products, yes.

Q As a matter of fact, it was during the time you worked at Philip Morris that Marlboro overtook Winston as the leading selling brand in the country; isn't that right?
A That's correct.
Q Now, during your employ at Philip Morris, did you not -- you were not given any internal Reynolds Company documents; were you?
A Given them to read, you mean?
Q Yes?
A No. No, I was not.
Q And before you worked for Philip Morris, you had not seen any internal Reynolds documents, had you?
A I don't recall any, that's correct.
Q Between the time you left Philip Morris in 1984, and some time into the 1990s, did you not see any Reynolds internal company documents either; did you?
A Well, I saw a shipping order.
Q Okay.
You did not see any, for example any blend sheets; did you?
A No.

Q You did not know the internal parameters, through a Reynolds document, of any Reynolds cigarette; right?
A Not through a Reynolds document.
Through a Philip Morris document.
Q That reverse, of a Reynolds product?
A That examined the blend composition of all competitive products, yes.
Q And that's a very important thing to do is examine the blend of your competitors, isn't that right?
A Yes.
Q All right.
And, as far as Reynolds documents go, you did not see any R.J. Reynolds internal document, for example, that analyzed the blend of Salem?
A As of when?
Q During your employ at Philip Morris?
A My employee at Philip Morris, that's correct.
Q After your employ in Philip Morris until

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the time in 1990, you did not see any internal Reynolds document analyzing the blend of Reynolds cigarettes; is that correct?

Doctor Farone - Plaintiff - Cross/Kaczynski

A Not during the 1980's, that's correct.

Q You discussed with the jury yesterday, in fact, you had your diagram there, you told the jury what tar was; correct?

A That's correct.

Q And I think this morning you spent a little bit of time telling the jury what nicotine was.

Do you recall that, sir?

A That's correct.

Q Okay.

Now, if we go back in time, some of your testimony concerned events in the 1950's.

If we go back in time to the 1950s, the average tar yield of a commercial cigarette was somewhere in the neighborhood of 38 milligrams, is that right?

A Higher than 30. 38.

Depends on what years you are taking for that --

Q 1950, '51, '52?

A Early 50's, probably correct.

Q Average nicotine level was somewhere in the neighborhood of 2.7 milligrams?

A Two and a half, something like that, yes.

Doctor Farone - Plaintiff - Cross/Kaczynski

Q Those numbers have fallen dramatically since the 1950's haven't they?

A They have.

Q And today the average is approximately 12 milligrams tar, does that sound accurate?

A Of all cigarettes sold, weighted by sales.

Q Sales weighted average?

A Sales weighted average.

12, 13, sounds about right.

Q Why don't you tell the jury what a sales weighted average is?

A If you have a cigarette that has 20 milligrams of tar and you sell 100 of those, and you have a cigarette that has ten and sell 100 of those, then the sale weighted average would be 15.

It's not just the tar level but it's the tar level divided, multiplied by the number you sell, divided by the total number that are sold.

So, like a weighted average.

THE COURT: That's similar to the fleet average of gas mileage by manufacturer also?

THE WITNESS: Yes.

THE COURT: Everybody knows what we are talking about.

Doctor Farone - Plaintiff - Cross/Kaczynski

All the cars in the country sold by a particular company would have this particular gasoline mileage.

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This is a similar kind of number, fair?
Q So, so to speak, the miles per gallon of a cigarette today is probably in the neighborhood of, you said, 12 to 13 milligrams?
A 12, 13 milligrams of tar average.
Q Of tar.
And nicotine is under a milligram, isn't it the sales weighted average?
A Yes, and we have to be careful to qualify this.
These numbers are determined by the federal trade commission standard technique.
They are not really the numbers that a smoker gets. We have to be careful on that.
Q The Federal Trade Commission testing technique is the technique that's required by the Federal Government to test cigarettes?
A It is required.
It just doesn't give the amount that the smoker gets.
Q These cigarette companies, you know from

your review of the documents told that to the FTC at the time it was implementing this method; correct?
A Told them what?
Q That the FTC method with not telling them not to tell any cigarette smoker their precise intake of tar and nicotine?
A I think that was part of the documentation for the study that it wasn't going to tell you, for example, how an individual smoker smoked.
It wasn't going to tell you what happened if you lower tar and nicotine, that people would smoke more because nicotine was lower.
Q And in fact, the FTC, when they had their press release announcing the implementation of the program, told that to the general public as well; didn't they?
A That was back in the.
Q '60's?
A '60's, and we are talking about developments after that.
I am a little confused of time.
Q I am focusing on the time -- by the way, your wife worked on that, didn't she?
A Yes.

Q She worked on the Cambridge end of the smoking machine pad?
That would be the pad the tars the smokers pass through the machine?
A That's correct.
Q Now, beginning back in the 1950s, the public health community decided that it would be a good thing if the tar and nicotine levels of cigarettes would be lower?
MR. FINZ: Objection.
Public health community?
MR. KACZYNSKI: Fine.

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I will rephrase.
Q Prominent scientists, such as Doctor Wynder, advocated that the tar and nicotine levels of cigarettes be lowered back in the 1950's; is that right?
A That's correct.
Q And when the -- after the 1964 surgeon general's report was issued, it became the official position of the United States government that the tar and nicotine levels in cigarettes should be lowered; is that correct?
THE COURT: Sustained.

Doctor Farone - Plaintiff - Cross/Kaczynski
Q Surgeon general of the United States took the position -- surgeon general of the United States encouraged the lowering of tar and nicotine levels?
MR. FINZ: Objection.
THE COURT: Sustained.
Q Cigarette companies in the 1950s were making products that were approximately 38 milligrams of tar or higher, correct?
A That is correct.
Q That number dropped to approximately 13. Today we went through that already, correct?
A Right.
Q And in fact, let me show you a -- you are familiar with the 1989 surgeon general's report?
You've seen that, haven't you?
A Which one?
Q 1989?
A Yes, I have.
Q And the 1989 surgeon general's report dealt with the changing cigarette?
A Yes, it did.
Q And one of the things that remarked upon was the decline in tar and nicotine levels in cigarettes, didn't it?

Doctor Farone - Plaintiff - Cross/Kaczynski
A Well, particularly the tar level.
The nicotine and tar ratio actually increased.
Q That they had a chart in that report that graphically detailed the drop from the 1950's to 1980; isn't that right?
A It showed the decrease predominantly in tar, with a very minor decrease in nicotine.
Q Let me show you this chart the jury has seen during my opening statement.
Is this chart, during --
MR. FINZ: I object to any viewing of this chart by anyone until is in evidence.
MR. KACZYNSKI: The surgeon general's report is in evidence.
MR. FINZ: We have not seen this. It has not been shown to us.
I don't even know what that is.
I haven't seen --
MR. KACZYNSKI: That's your fault, not mine.

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(Pause.)
MR. KACZYNSKI: Surgeon general's reports are in evidence, Your Honor.

THE COURT: All of them?
MR. KACZYNSKI: Yes, Your Honor.
MR. LONDON: I would --
THE COURT: Come on up here.
(Whereupon, a discussion was had off the record.)
(Whereupon, the following takes place on the record in open court:)
MR. LONDON: We have no problem.
Surgeon general's report is in.
(Pause.)
MR. FINZ: Thank you.
I have no problem with that.
MR. KACZYNSKI: Thank you.
MR. FINZ: Now that I have seen it.
Q Let me show you this chart that the jury saw in the opening statement, Doctor Farone.
This is a chart from the 1989 surgeon general's report, is it not?
A I would like to compare it with the surgeon general's report, if I could.
Q We will do that.
(Pause.)
MR. KACZYNSKI: Okay.

We will come back to this.
Q Doctor Farone, the tobacco companies were encouraged to lower tar and nicotine during the 1950's, were they not?
MR. FINZ: Objection.
Matter of form.
THE COURT: Sustained.
Q Among those encouraging these tobacco companies to lower tar and nicotine during the 1950's was Doctor Wynder?
MR. FINZ: Objection.
THE COURT: Sustained.
MR. KACZYNSKI: Your Honor, could we approach?
THE COURT: Yeah.
(Whereupon, a discussion was had off the record.)
(Whereupon, the following takes place on the record, in open court.)
Q In fact, from the 1950's to today, tar and nicotine levels have been lowered dramatically?
MR. FINZ: Objection.
Repetitious, Your Honor.
THE COURT: Overruled.

Cross-examination.
Q That's right, isn't it?
A That's correct.

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Q Okay.
And it's the tobacco companies that are involved in this lawsuit that devised the techniques to lower tar and nicotine, on an average of 38 grams to approximately 13; isn't that right?
A Are all the companies involved in this lawsuit?
Q All the major companies are involved in this lawsuit.
Let me ask you individually specifically about my client.
R.J. Reynolds Tobacco Company lowered tar and nicotine in its products from the 1950's to the 1990's; correct?
A That is correct.
Q And they invested significant resources in doing so, correct?
A Yes.
Q And it was a reasonable and responsible thing to do, wasn't it?
MR. FINZ: Objection.

THE COURT: Ill allow that.
Well, was it reasonable to do, sir, based upon your testimony?
THE WITNESS: Based on my testimony?
THE COURT: Well, you were the one who indicated this nicotine is addictive so that you would agree that lowering it was responsible?
THE WITNESS: Well, lowering the carcinogens is only responsible if you lower them to an effectively low level, and you have to prove that.
To say that you reduced the number of bullets you are shooting at somebody from 300,000 to 100,000 is not necessarily responsible if you don't prove it.
THE COURT: Go ahead. Next question.
Q When the tar and nicotine levels are lowered, many of the substances you talked about yesterday are also lowered; aren't they?
A In number, that is correct.
Q Like for example, Benzo (A) Pyrene is lowered as tar and nicotine levels are lowered; isn't that correct?

A The amount is lowered but we have no evidence --
Q The answer to my question is; yes, the amount is lowered?
MR. FINZ: May he conclude?
THE COURT: I thought he did.
No, he can't.
The but should not have been part of the answer.
THE WITNESS: Okay.
Q When tar and nicotine levels are lowered, the levels of nitrosamines are lowered; aren't they?

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A No.
Q We are going to come to nitrosamines.
Every major design innovation, beginning in the 1950's to date, has come from an American tobacco company; isn't that correct?
A No.
THE COURT: Counsel.
Q You testified in a -- gave a deposition in an case by the name of Whipple; do you recall that?
A Yes.
Q Case pending in Florida?
A Yes.

Q And you were sworn in that case?
A Yes.
Q You were asked this question=?
MR. FINZ: Mind if I read over your shoulder, Mr. Kaczynski?
MR. KACZYNSKI: Absolutely.
MR. FINZ: Thank you.
THE COURT: Absolutely or absolutely not?
MR. KACZYNSKI: Absolutely.
MR. FINZ: Thank you.
(Handing.)
MR. FINZ: Thank you very much.
What page?
MR. KACZYNSKI: 560 going on to 561.
MR. FINZ: What?
MR. KACZYNSKI: 560 going on 561.
Q "QUESTION: Other than that, referring to something else, every major cigarette design and advance has come from a United States tobacco company?
"ANSWER: I don't know if I agree with it categorically but I can't think of any difference, so I will agree.

A In that particular -- could I see that because that was not addressed to all facets of the design.
For example, here we talked about putting labels on the product and things of that sort.
I don't think that came from the United States manufacturers.
Q Here we talked about things like, and Whipple talked about some amount of detail, a ventilated filter.
That was produced by American companies?
A Yes.
Q Porous paper?
A There were many, I'm not disagreeing.
Just the categorization of all it was objected to.
The U.S. Cigarette companies have made many modifications to their product. Some, I think, were good modifications.
Q We are going to go through those, probably after lunch.

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MR. KACZYNSKI: Your Honor, I can break now, if you want to.
THE COURT: I am listening to your

- Proceedings -

request for more time for lunch.
2 o'clock. Folks.
You don't think I don't listen, huh?
(Jury leaves courtroom.)
THE COURT: I have previously issued instructions about not making these kind of comments in front of the jury.
Now, I seem to be not listened to.
So that I'm warning you now, I am going to start sanctioning those comments.
I want none of that in front of the jury.
I'll add them up and when you hear the statement, that's $100, you will know exactly what I am talking about.
I'm going to start fining you. I'm going to get control of this courtroom. I'm warning you now, I'm going to sanction.
I wants all of these comments stopped.
MR. FINZ: Your Honor, as a matter of protocol, I'm going to ask that counsel give the same courtesies that we have given counsel with respect to the exhibits.
Now --

- Proceedings -

THE COURT: Absolutely.
MR. KACZYNSKI: Absolutely.
THE COURT: And you are entitled to it, and please do it.
Have a nice lunch.
MR. FINZ: Thank you.
MR. KACZYNSKI: Absolutely.
MR. QUIGLEY: Yes, Your Honor.
(Luncheon recess.)
(Whereupon, Michael D. Isaacoff, Senior Court Reporter, is relieved by Judith Brusca, Senior Court Reporter.
(Continued on next page.)

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A F T E R N O O N S E S S I O N.

(The following takes place outside the presence of the jury:)

MR. KACZYNSKI: Your Honor, before the break the issue of whether I could cross-examine Doctor Farone on what the Surgeon General was saying about low tar and nicotine, what the people like Wynder was saying was at issue.

THE COURT: Specifically, counsel, the issue of Wynder. Go ahead.

MR. KACZYNSKI: The issue of the Surgeon General too.

And the question was, basically what I wanted to elicit from Doctor Farone or cross him with, if he didn't give it to me, is the fact the Surgeon General of the United States -- it was the position of the U.S. Government beginning in 1966 and the position of the Surgeon General or some successor Surgeon General, reports tar and nicotine should be lowered because lower tar and nicotine produced fewer tumors than high tar and nicotine.

The reason this is important is because my client and these other clients are on trial for

the reasonableness of their cigarette design, in my case particularly.

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THE COURT: Not under federal law.

MR. KACZYNSKI: No. This has nothing to do with federal law.

THE COURT: That is where I'm coming from.

MR. KACZYNSKI: Well, where I'm coming from is the Surgeon General of the United States and other public health authorities are publicly advocating the lowering of tar and nicotine.

My client and these clients are responding to those calls. That is the heart of the reasonableness of the defense in this case. It's not simply --

THE COURT: What reasonableness defense?

MR. KACZYNSKI: Reasonable manufacturer in designing its products.

THE COURT: Post '69.

MR. KACZYNSKI: I'm in for pre and post '69.

THE COURT: You got to differentiate. The Surgeon General -- if the FDA would have classified your product as a drug and they would have administrative authority over your product.

The opinion of that, not the individual, but

the opinion of the collective body of the FDA, whatever that is, you would be bound by.

Now, the Surgeon General, while his opinion is respected, this case is not decided on those

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opinions.

MR. KACZYNSKI: Now. But, your Honor, it's a factor in determining whether my client acted reasonably. It's precisely because we are not bound by the Surgeon General that it is important.

THE COURT: Let's agree that Doctor Wynder, were he here and gave that testimony that would be certainly allowed. But he is not here.

MR. KACZYNSKI: Right.

THE COURT: As yet. We never know what will happen in this case.

MR. KACZYNSKI: That could be quite dramatic because he died a few years ago.

THE COURT: I'm sure there are other equally prominent scientists who are alive who could show up and I would respectfully allow this jury to hear their opinions. That is not the issue.

You cannot defend a case or prosecute the case on opinions of people outside of the courtroom.

MR. KACZYNSKI: That is precisely what the Plaintiffs did.

THE COURT: I don't know what the Plaintiffs did.

MR. KACZYNSKI: We heard the opinions of Doll, Hill, Wynder and Graham.

THE COURT: Which were accepted as

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authoritative in their fields.

MR. KACZYNSKI: I could ask the witness whether the Surgeon General is authoritative in the field of public health. I can't imagine anybody that would say no.

MR. MOLLON: Can the witness be excused?

THE COURT: You ask him that question. You did not hear me sustain such an objection; do you?

MR. KACZYNSKI: If I ask the question in 1979, the Surgeon General of the United States in 1979, Surgeon General report said X.

THE COURT: Not yet. Is it in evidence?

MR. KACZYNSKI: They are in evidence.

THE COURT: Then you may.

MR. KACZYNSKI: Okay. Thank you, your Honor.

MR. LONDON: Before we begin we want to know

what page of the chart Mr. Kaczynski referring to.

MR. KACZYNSKI: 89.

MR. LONDON: 88 or 89.

MR. KACZYNSKI: 89, page 88.

Here, by the way, are the Surgeon General reports that I'll be reading from, if you want to follow along.

MR. LONDON: I want to look at the reports on 88.

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MR. KACZYNSKI: If you want to take a look at some physical exhibits I may use.

THE COURT: Again, I want to caution all attorneys to avoid the cross conversations in front of this jury or which can be heard by this jury. I am not a happy camper.

MR. FINZ: Excuse me, your Honor.

With respect to these two jars, one which is marked A-2513, the other A-2502, I'm going to object to any label on these jars, which is a label that obviously was put there by the Defendants.

MR. KACZYNSKI: Well, I'll ask the witness if the label is accurate.

MS. STEVENS: We received no objection to that

exhibit. It's been on our exhibit list.

MR. FINZ: The exhibit itself is not objectionable. I don't know about seeing a label attached to it.

MR. KACZYNSKI: Does your Honor care to take a look?

THE COURT: Isn't that the exhibit number?

MR. KACZYNSKI: No. This is the label.

THE COURT: I thought the objection was to the labeling.

MR. FINZ: It is to the label itself; that is my objection.

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THE COURT: Let's take it subject to connection of the witness.

MR. KACZYNSKI: Certainly, your Honor.

The other housekeeping detail is we have not yet gotten exhibit designations for Doctor Cummings, thinking Doctor Cummings would be beginning testimony tomorrow.

THE COURT: Why would that be appropriate; it's only my order.

MR. LONDON: They have gotten their exhibit and expert designations twenty-four hours, seventy-two hours in advance. They have gotten

Cummings before seventy-two hours.

I don't know how long Doctor Farone is going to be on cross. We are getting vague answers. They will have it by the end of the day when I could get to a computer and fax it to them. We are in a state of limbo. I'm hearing three hours, four hours, two hours into tomorrow now.

MR. KACZYNSKI: We have done fifteen minutes. I think asking an approximation at this point is unreasonable. I think it is safer to say he would begin sometime tomorrow, in which case we are entitled to them some time today.

MR. LONDON: If he begins four, five tomorrow you're entitled to it at four, five tomorrow.

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MR. KACZYNSKI: I don't think we are going to start a witness four, five tomorrow.

MR. LONDON: We will start a witness on Thursday. They will have it at the end of the court day.

THE COURT: Do you need my response to this counsel? Do you really need it?

MR. KACZYNSKI: Your Honor --

THE COURT: With all due respect, you may take under advisement all the statements that I

have said about this same topic previously without me repeating it.

MR. KACZYNSKI: I understand your Honor.

THE COURT: Somehow Mr. Kaczynski does not seem to be inclined to go much beyond today.

This being two o'clock I would rest assured he will be finished before lunch tomorrow so that under no circumstances could you give him the exhibits within twenty-four hours.

(The jury enters the courtroom.)

DOCTOR WILLIAM FARONE, called as a witness, having been previously duly sworn, testified as follows:

MR. KACZYNSKI: May I proceed, your Honor?

THE COURT: Yes.

MR. KACZYNSKI: Good afternoon.

CROSS-EXAMINATION

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BY MR. KACZYNSKI:

Q Good afternoon Doctor.

A Good afternoon.

MR. KACZYNSKI: With the Court's permission I would like to read a passage from the 1981 Surgeon General report.

THE COURT: That is in evidence?

MR. KACZYNSKI: Exhibit A-2233, page 200, toward the bottom of page 200.

Q "In 1966 the PHS" -- PHS, Doctor, would be Public Health Service?

A Yes.

Q "The PHS submitted to congress the technical report on tar and nicotine on the basis of the clear demonstration of the cigarette dose depended risks of several diseases, the PHS concluded at this time preponderance of scientific evidence strongly suggests that the lower the tar and nicotine content of cigarette smoke the less harmful would be the effect. We recommend the progressive reduction of the tar and nicotine content of cigarette smoke."

Now, Doctor Farone, your work in the cigarette industry -- you know that was the position of the United States government back in 1966?

THE COURT: The Surgeon General.

MR. KACZYNSKI: Public Health Service.

Q The Surgeon General.

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THE COURT: Or Public Health Service.

Q The Surgeon General's position in 1966.

MR. FINZ: Excuse me, your Honor, I'll object to that on the grounds that the Surgeon General's report is dated 1981.

MR. KACZYNSKI: That's right.

Q This is the 1966 position being recounted in the 1981 report?

MR. FINZ: Not from what -- objection, your Honor.

THE COURT: Overruled.

Q Let's rewind.

In 1966 it was the position of the Public Health Service to encourage development of lower tar and nicotine cigarettes.

We can agree on that; is that right?

A That was the position, to reduce tar.

Q In 1981 when this quote was reprinted in the 1981 Surgeon General report that was the position of the Surgeon General in 1981; is that correct?

A Not quite so sure. You look at the whole thing in context, coming up to the present time, I don't know that it changed. I don't know there was any additional recommendation between --

Q Okay. Well, take a look at a few --

MR. KACZYNSKI: Your Honor, with the Court's permission I would like to read a passage from the

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1979 Surgeon General report, exhibit A-2231, page Roman XIV.

Plf - Dr. Farone - Cross (Kaczynski)

If we could put it on the screen for the Court and counsel too.

Could I display that to the jury?

THE COURT: Yes.

Q "Until these scientific and behavioral issues are resolved there can be no final assessment of the public health benefits of our present search for less hazardous cigarettes. The preponderance of scientific evidence continues as in 1966 to suggest that cigarettes with lower tar and nicotine are less hazardous."

MR. RANDLES: Can we take that off the screen and approach with the Court's permission?

THE COURT: Yes.

(Discussion held at the bench, off the record.)

Q I'll start with the beginning again.

"Until these scientific and behavioral issues are resolved there can be no final attempt of the public health benefits of our present search for less hazardous cigarettes. The preponderance of scientific evidence continues as in 1966 to suggest that cigarettes with lower tar and nicotine are less hazardous."

That was the position of the Surgeon General of the United States in 1979; was it not Doctor Farone?

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A That's a portion of the Surgeon General's position. If you read the rest of it it says consumer --

Q Doctor Farone, that was the position?

MR. FINZ: Well --

THE COURT: No. No. The answer is that is not.

Do I understand that you are saying that is not the entire position?

THE WITNESS: That is correct.

THE COURT: Go ahead.

Q Let's skip ahead.

Let's talk about cigarette design in general.

There are two general ways to reduce tar and nicotine, reduce actually constituents of cigarette smoke.

One is known as general reduction; is that correct?

A Yes. You want to classify it as general, okay.

Q Another would be called specific reduction?

A Okay.

Q General reduction is the situation where tar and nicotine are lowered through a variety of techniques generally together and in the process some specific constituents are also reduced; is that accurate?

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Plf - Dr. Farone - Cross (Kaczynski)

A No.

Q In general reduction tar and nicotine are lowered together; is that correct?

A No.

THE COURT: Wait a minute. I think we are having a problem.

Are we talking about the effect? You're talking about the effect?

THE WITNESS: No. I'm talking about the lowering them together. The nicotine was not lowered to the same extent the tar was.

THE COURT: That is what I thought.

You were talking about the result?

THE WITNESS: Yes.

THE COURT: He was talking about the process.

THE WITNESS: Okay.

THE COURT: This is why I interfere and why I try to move the process along. This is a good example of that, so don't mind that I'm asking questions here. I have every right to. But this is one of the reasons why I'm doing it.

I see from the question and from the answer that they are on different planes. We want to get them on the same plane.

Plf - Dr. Farone - Cross (Kaczynski)

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Now ask the question again.

Q In general reduction, tar is lowered?

A That's correct.

Q And to some degree nicotine follows?

A That's correct.

Q Specific reduction is when a specific constituents is targeted for reduction or removal; is that right?

A Okay, I could accept that definition, yes.

Q Now, cigarette design is a somewhat complicated process; isn't it?

A Yes.

Q In fact, in specific reduction sometimes when you try to reduce one constituent thought to be harmful you may wind up raising another; correct?

A That is why the importance of determining which one is more harmful is key.

Q Sure. Because one way to lower --

THE COURT: Thank you for your agreement, counsel.

Sure is almost the equivalent of evidence and it is stricken.

Q Benzo(a)pyrene can be lowered by the addition of nitrates to a cigarette; correct?

A Yes.

Q But if you do that what do you increase?

A Among other things you increase nitrosamines.

Q In reducing one bad guy you can actually increase

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another bad guy?

A That is correct.

Q Another example would be controlling the temperature of the burning of the cigarette; right?

If you could lower the burning temperature that would lower benzo(a)pyrene as well?

A Yes, in general it would.

Q The cooler temperature could increase alkaloids; correct?

A It may.

Q As a consequence of trying to reduce one bad guy you could increase another bad guy?

A The conclusion is that you must do the testing on the whole product that you finish with to determine whether you have made a beneficial reduction if you attempt either of those.

Q You should look to reach a balance as you're trying to reduce specific constituents of cigarette smoke?

A balance, for example, the burning temperature, not doing it too much that you increase unduly the other bad constituents; correct?

A No, I wouldn't say a balance. The objective, as I understand it, is to remove them both. You take out the nitrosamines, you then work on the PAHs. You take out the ones that you know are the worst, you take them out completely. Then you work on the next level of things.

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Q Another factor in cigarette design is consumer affectability?

A Well --

Q Let me rephrase.

Whatever the end result of your design process is, if nobody buys it the public health hasn't done any good; right?

A I think I disagree with that.

Q If you have an absolutely safe cigarette that no one smokes, have you increased the public health?

A Wait a minute. Let me understand.

Am I to assume that other cigarettes are still on the market?

Q Yes.

A You have hazardous and safe ones. Nobody smokes the safe one.

Q That doesn't increase the public health; does it?

A I understand.

Q That is a factor in designing cigarettes you have

to take into account?

A If everybody produced the safe cigarettes then there would be no hazardous cigarette on the market so the public would not have to make that obnoxious choice. They wouldn't have to select or smoke --

It's only in the case where you keep a hazardous cigarette on the market and you have a safer one that the safer one may not be as acceptable as the

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hazardous one.

Q Only in the world where the consumer is given no choice that their public health has improved?

MR. FINZ: Objection to that.

THE COURT: I'm sorry?

MR. KACZYNSKI: I'll withdraw the question.

Q Now, one general reduction technique is filters; correct?

A Correct.

Q Filters have been on cigarettes since, certainly in large use, since the fifties?

A Yes.

Q You know Reynolds put its first filter on a cigarette in 1954; that was Winston.

A About that time. I can agree.

Q They put its first filter on a menthol cigarette

in 1956 and that was Salem.

A I don't know the date exactly, but I can agree about that time.

Q So if you assume that Clyde Anderson smoked Salem cigarettes from the mid sixties to 1993, every Salem cigarette he smoked had a filter. We can agree on that; can't we?

A As far as I know that is the case.

Q Adding a filter reduces tar and nicotine; does it not?

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A To some degree, yes.

Q Let's talk about. There is a type of filter known as cellulose acetate; correct?

A Well, cellulose acetate is a material that is used in making the filter, a portion of the filter.

Q Cellulose acetate filters, according to the Surgeon General, can selectively reduce phenols and nitrosamines in cigarette smoke; correct?

A I believe I've seen that statement, yes, that it can reduce it.

Q Perhaps in the 1989 Surgeon General report?

A That is probably where I saw it.

Q Now cellulose acetate filters use a plasticizer. Tell the jury what a plasticizer is.

A Where you have this cellulose acetate, it comes sort of if you would envision a roll of toilet paper. It's long and fluffy.

That all has to be compressed to put inside the filter of the cigarette. If you compress it it may not stick together and it may not move very well. So a chemical triacetin, for example, one of them is used as a plasticizer to help hold that together so it's easier to compact into that tight filter.

Q Cellulose acetate filter, using triacetin can selectively reduce phenols in cigarette smoke; correct?

A Doesn't remove them. It just selectively reduces them, that is correct.

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Q Phenols are one of those groups of compounds you think ought to be eliminated from cigarettes?

A I believe they should remove, not just reduce.

Q A cellulose acetate filter using triacetin can also reduce acrolein in cigarette smoke?

A It can. It reduces it, but it doesn't eliminate it.

Q That is another bad guy you would like to see out of cigarette smoke?

A I would like to see eliminated, correct.

Q Another technique in general reduction of tar is

known as air dilution; correct?

A Yes, that is one terminology. Ventilation deletion, yes.

Q Ventilation or deletion would consist of both porous paper in the cigarette rod?

A Yes. It allows the porous paper in the cigarette rod, allows chemicals to escape through the paper and allow some air to come in through the paper.

Q Reducing tar and nicotine as it does that?

A Well, the primary purpose is to reduce components such as carbon monoxide. It has a small effect on the tar and nicotine.

Q The other site for ventilation in a cigarette would be in a filter?

A Correct.

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Q You worked on ventilated filters?
A Yes.
Q And you are proud of your work on ventilated filters?
A I am.
Q Ventilated filters reduce carbon monoxide in cigarette smoke?
A Yes. Again, it's the general reduction that occurs when you do that.

The question again is how far down you need to go to make a difference.
THE COURT: Why are we talking about carbon monoxide?
MR. KACZYNSKI: Effect of a ventilated filter.
THE COURT: That is not a carcinogen.
MR. KACZYNSKI: No.
THE COURT: Why are we talking about it?
MR. KACZYNSKI: Because I asked him.
THE COURT: I'm asking a generic question.
The reduction of carbon dioxide does not effect the carcinogen levels of cigarettes so it's not relevant to what we are talking about. While it's very interesting, let's get on to what we have to deal with.
Q Let's talk about nitrosamine yield.
A ventilated filter and porous paper reduce nitrosamine yields?

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A Does not eliminate it. It reduces it.

Q Did any of my questions say eliminate?

It reduces it; correct?

A Reduces it, correct.

Q And reducing nitrosamine yield in cigarette smoke is a good thing?

A Well, it's better to have less, yes.

Q Ventilated filters specifically reduce tobacco specific nitrosamines; that is correct?

A Well, they only reduce the nitrosamines to the extent that you're sucking in some air in place of the stuff. Doesn't change the carcinogenic potential. What you're --

Q The answer to my question is yes, a ventilated filter reduces the level of nitrosamines in cigarette smoke?

A It can increase the level of nitrosamines.

I think there is some doubt that -- generally speaking, I could agree with you. Problem I'm having, if you make a generalization, I've seen from some low-delivery cigarettes there is actually an increase of nitrosamines over high-delivery cigarettes as a general rule.

THE COURT: High-delivery, low-delivery means?

THE WITNESS: High tar and low tar.

THE COURT: Thank you.

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Q Porous paper and ventilated filters reduce polycylic hydrocarbons in cigarette smoke?

A Yes, they do.

Q That is a good thing?

A Reduction is good. Not as good as elimination.

Q We don't want to make the perfect the enemy of the good, do we Doctor?

MR. FINZ: Excuse me.

MR. KACZYNSKI: I withdraw the question.

THE WITNESS: Sustained.

THE COURT: Maybe we do. That's for the jury to decide.

Q Now, the jury has heard a little about the tobacco working group. The tobacco working group was an ongoing effort while you were at Philip Morris; correct?

A That is correct.

Q That was approximately a ten-year cooperative effort between the federal government, public health authorities and the cigarette industry to try to develop a less hazardous cigarette; is that correct?

A No.

Q What was the formal name of the tobacco working group?

A I can't recall. That is not the basis of my answer.

Q The tobacco working group was comprised from members of the tobacco industry; correct?

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A That is correct.

Q And from the federal government; correct?

A That is correct.

Q Including the National Cancer Institute?

A That's correct.

Q In fact, this group was under the aegis, under the cover of the National Cancer Institute; correct?

A Cover you mean that they supported it or that they sponsored the work?

Q Yes, sponsorship?

A Yes, they sponsored.

Q The Department of Agriculture had representatives in the tobacco working group?

A That is correct.

Q Philip Morris had a representative on the tobacco working group?

A That is correct.

Q As did R.J. Reynolds?

A Yes.

Q As did the other cigarette companies?

A Yes.

Q And one thing the tobacco working group did was test the tumorigenicity of design changes that had been implemented up to that point; correct?

THE COURT: What are would talking about?

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MR. KACZYNSKI: Prior to '69.

THE COURT: Why would he know about this?

MR. KACZYNSKI: I'm sorry. Began in '68 and continued until about '78.

MR. FINZ: Objection to that statement.

MR. KACZYNSKI: My client is in design all the way.

MR. FINZ: Objection to that Judge.

THE COURT: You're right, your client is.

Q One of the things the tobacco working group did was test in mouse-skin painting experiments the tumorigenicity of design changes like ventilated filters, porous papers and reconstituted tobacco; is that correct?

A In finished products? I'm not sure I understand.

Q Not in a finished product. Cigarettes using those techniques against the Kentucky reference cigarettes.

A They tested reference and prototypes.

Q They took a gram of tar from the reference cigarette; right?

A Well, depends on which test we are talking about.

Q In mouse-skin painting.

THE COURT: Can I know what the Kentucky reference is? As long as you know me and the jury would like to know.

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Q Tell the jury what the Kentucky reference cigarette is.

A Throughout the course of the tobacco industry reference cigarettes have been devised.

Reference cigarette is something that is supposed to be sort of like or typical of a cigarette that is marketed in the given period of time. So there is a reference cigarette for unfiltered cigarettes. There is a reference cigarette for filtered cigarettes and a reference cigarette for low tar cigarettes.

Nobody sells reference cigarettes. They are a sort of a marker that could be used.

Q There are standard cigarettes, so if different people during the course of a year conduct tests they all have the same basis of comparison?

MR. FINZ: Objection to the word standard.

Objection to the form of the question.

THE COURT: That is overruled. I want to know what we are talking about.

Other words, this was an item that tests for reference to, Doctor?

THE WITNESS: Yes. It's just a basis for the test, so yes.

I mean, if you tested, for example, Marlboro

and Winston against the reference cigarette you

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would know something about Marlboro and Winston.

Q In mouse-skin painting test that was conducted by the tobacco working group, the tobacco working group contracted out with outside labs?

A Correct.

Q National institute of Health didn't have their own people painting mice?

A Most of that was done by government contract, correct.

Q And there is nothing wrong with using outside labs to conduct biological research?

A No.

Q It is done all the time?

A Yes, it certainly is.

Q You did at Lever Brothers?

A Yes.

Q What the outside labs did, they took a gram of tar from the Kentucky reference cigarette, a gram of tar with the cigarette from design changes and looked at the tumorigenic activity when painted on mouse skin?

A Correct.

Q In that test cigarettes made with ventilated filters and porous paper had less tumor activity or

biologic activity than the Kentucky reference?

A Prototype cigarettes made with those design changes showed less tumorigenic activity in mice, yes.

Q Same thing we are going to talk about,

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reconstituted tobacco. Same thing when reconstituted tobacco was tested; correct?

A Many test results and prototypes have shown a reduction in tumorigenicity.

Q Now, you know from your review of Reynolds company documents that Reynolds was actively involved in the tobacco working group; correct?

A Yes, I do.

MR. KACZYNSKI: Pull up for the Court and jury A-3130 -- Court and counsel.

Your Honor, A-3130 is an exhibit that was not objected to.

THE COURT: Okay.

MR. KACZYNSKI: I would move its admission at this point.

THE COURT: If you refer to it it is admitted unless objected to.

MR. KACZYNSKI: Okay.

THE COURT: Unless it is not on the list that you have provided to the Court.

MR. KACZYNSKI: It has been and not been objected to.

THE COURT: Okay.

Q Doctor Farone, this is a document entitled Update. Is it on your screen?

A Yes.

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Q Update on the Smoking and Health Issue and Smoking to Mr. J.F. Hind from Murray Senkus.

Senkus was the Director of Research at the time?

A That is my understanding. I don't know exactly 1977, but he was Director of Research at R.J.R.

Q November 17, 1977.

MR. KACZYNSKI: If we could go to the next.

THE COURT: We had trouble with it earlier.

MR. KACZYNSKI: I think because it was from the sixties.

THE COURT: Don't answer.

Q Let me show you a hard copy of the exhibit there Doctor Farone. See the heading under which the highlighted section is right there?

A Yes.

Q The heading that I just pointed out to Doctor Farone is entitled The Smoking and Health Program of the

National Cancer Institute. I'm going to read the paragraph that actually precedes this as well as this.

"The Smoking and Health Program of the National Cancer Institute.

"Smoking and health program of the National Cancer Institute was instituted in 1968. In establishing the smoking and health program the Institute recognized that a very substantial part of the population will continue to smoke and in view of this presumption and in

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view of the government belief that smoking is hazardous to health the program was assigned the goal of developing an allegedly safer cigarette. To date" --

THE COURT: One moment. I'm sorry. Go ahead.

THE WITNESS: Excuse me, I don't have on my screen what you're reading from.

MR. KACZYNSKI: I'm done on that part. I'm going to start with to date.

THE WITNESS: I would like to make sure.

Q "To date about 120 experimental cigarettes" --

MR. FINZ: You're starting to read something. You left something out.

Objection until that entire paragraph is read.

MR. KACZYNSKI: I just read the entire paragraph.

MR. FINZ: Unless I misheard something.

MR. KACZYNSKI: I'll start off all over. I'll give you a hard copy to follow along.

THE COURT: Counsel, if there is something that is not read, since it is in evidence you may read it on redirect or any other time without this interruption.

MR. KACZYNSKI: I'll start all over.

Q "The Smoking and Health Program of the National

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Cancer Institute.

"The smoking and health program of the National Cancer Institute was instituted in 1968. In establishing the smoking and health program the Institute recognized that a very substantial part of the population will continue to smoke and in view of this presumption and in view of the government belief that smoking is hazardous to health the program was assigned the goal of developing an allegedly safer cigarette. To date approximately 120 experimental cigarettes have been designed and tested by painting their smoke condensates on the skins of mice. Based on the results to date, Doctor Gori, the Director" --

That is Doctor Gori, who ran the program?

A Yes.

Q "Doctor Gori, Director of the program has concluded that the following characteristics of cigarettes provide safer smoking:

"One. Use of high porosity cigarette paper."

You know from your review of Reynolds documents that Reynolds used high porosity cigarette paper in some of its brands; correct?

A In some of its brands, yes.

Q "Two. Large proportion of reconstituted tobacco and stems in the blends."

You know from your research of Reynolds that Reynolds used reconstituted tobacco in many of its blends; correct?

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A Yes.

Q "Three. Extraction of tobacco with a suitable combination of hexane, water and surface agents."

You know from your review of Reynolds documents they tried to use hexane to remove the HP from cigarette smoke?

A They tried to do that with hexane, water and surface agents?

Q Yes.

A It didn't work?

Q You have not seen documents about hexane extractions?

A As far as I know it was never used in the commercial cigarette.

Q You're aware by the late fifties folks like Doctor Wynder thought hexane extraction was impractical?

THE COURT: Sustained.

Q I'll skip down.

THE COURT: I thought I gave you an instruction about that.

Q Use of air.

THE COURT: Not only the Plaintiff.

Q Use of air dilution filters.

You know Reynolds used air dilution filters in many of its products?

A Yes.

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MR. KACZYNSKI: Flip to the next one.

Q Doctor Gori, the Director of the Smoke and Health Program of the National Cancer Institute believes by implementation of the technology set forth above it is possible now to produce a safe cigarette.

You recall from the time that was Doctor Gori's opinion it was possible to produce a less hazardous cigarette?

A I don't agree with that statement. He never said I do not believe that it was possible to produce a safe cigarette, which is what is stated here.

MR. FINZ: Keep your voice up?

A It's a safer cigarette. So this is a misquote of Doctor Gori.

Q One of the other techniques that is used in general reduction is reconstituted tobacco; correct?

A General reduction of?

Q Tar.

A Of tar, yes. Okay.

Q You told the jury a little about that yesterday.

There are two types of reconstituted tobacco; blended leaf, sometimes called band cast?

A Yes. We didn't talk about it yesterday.

Q Not the different types. We will do that now.

The other one is blended leaf?

A Yes. Blended leaf and band cast are the same. Reconstituted leaf is the --

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Q Reconstituted leaf. You know Reynolds uses reconstituted leaf?

A Yes.

Q It's used reconstituted leaf in Salem since it was put on the market; is that correct?

A I don't know that specifically, but I believe that's the case. I don't have a year by year blend sheet data from Reynolds.

Q I'm going to hand you Plaintiff's exhibit 1116 that was designated by Plaintiffs for use with your testimony.

I just point out the last page dealing with Salem.

THE COURT: Is that in evidence?

Q Since that is my only copy, here.

(Handing.)

Q Can I take a look? You know from review of company documents that G7 is reconstituted tobacco?

A Yes, I do.

Q They use reconstituted tobacco. It says one type of G7 was replaced by another type of G7. See that Doctor?

A Yes.

THE COURT: I don't understand what that means.

What does one type mean and what is G7?

THE WITNESS: A form of reconstituted tobacco

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where they grind it up and make paper out of it.

Q One form could be from burley and another form could be from bright?

A Right and one could have lots of carcinogens and the other could have less.

Q You told us yesterday reconstituted tobacco was made from the stems, mid ribs, those parts of the tobacco leaf other than the laminar; correct?

A Correct.

Q Let me show you what has been marked as Defendant's A-2513 and I ask you if these appear to be tobacco stems.

THE COURT: They appear to be tobacco what?

MR. KACZYNSKI: Stems.

THE COURT: Stems.

A Yes.

Q Thank you. These tobacco stems go through --

THE COURT: Show it to counsel.

MR. KACZYNSKI: I showed him before.

MR. LONDON: May I see?

MR. FINZ: I saw that before, Judge.

THE COURT: Okay.

MR. FINZ: You want to smell it?

MR. KACZYNSKI: It's old stems.

Q And the stems are put through a paper making process and reconstituted tobacco sheet results; is that correct?

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Plf - Dr. Farone - Cross (Kaczynski)

A That's correct.

Q Let me give you what is marked as A-2505 and see if you can identify that as finished reconstituted tobacco sheet?

A Appears to be.

Q Thank you.

MR. KACZYNSKI: Mind if I rest them here on the jury ledge?

THE COURT: Have a good time.

Q Now, the mid ribs --

THE COURT: Am I amusing you counsel?

MR. FINZ: Excuse me? I thought your remark, your Honor, was very funny. I responded to the humor.

THE COURT: I'm glad to be. I thought only the jury has laughed at me. Go ahead.

MR. FINZ: I thought it was very amusing and I laughed at it.

Q The stems are lower in nicotine than the laminar, the rest of the tobacco leaf as it grows in the field; correct?

A That is correct.

Q And the resulting reconstituted tobacco sheet, because as it has gone through the process because of

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Plf - Dr. Farone - Cross (Kaczynski)

evaporation is actually lower yet in nicotine than it is when it comes in from the field; correct?

A Well, not always because it depends. If you use, for example, burley in one case and you use bright in another, the burley is going to have higher nicotine than the brite. You could end up with reconstituted sheet that actually had higher nicotine.

Q Nicotine is generally lost in evaporation during the course of reconstituted?

A Some of what is brought in gets lost during the process, yes.

Q Reconstituted tobacco process lowers tar and nicotine; correct?

A The use of reconstituted tobacco lowers tar and nicotine to the extent that stems are incorporated and reducing.

I mean, for example, you could do the same thing by putting stems in without putting them through the sheet-making process.

When you put them through the sheet-making process they have the same effect of lowering tar and nicotine than if you had put them in the cigarette.

Q End result, lower tar and nicotine in the final product; correct?

Plf - Dr. Farone - Cross (Kaczynski)

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A Not than if you had just put the stems in the cigarette.

Q The stems are lower in nicotine than the laminar; right?

A Yes.

THE COURT: We have heard that.

I think the Doctor's point was that the act of reconstituting them into this paper-like substance does not of itself lower any nicotine level.

It is the original tobacco use that is the primary function of the lowering; am I correct?

THE WITNESS: You are correct.

THE COURT: Let's go.

Q Reynolds has used reconstituted tobacco in some of its blend since 1950?

A That is correct.

Q You consider the use of reconstituted tobacco to be a good thing?

A Yes.

Q The 1989 Surgeon General report reports that the use of reconstituted tobacco reduces polycyclic aromatic hydrocarbons; is that correct?

THE COURT: Do you agree?

A I believe that is the case. I don't recall as I sit here without seeing it.

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MR. FINZ: May we have a page reference please?

MR. KACZYNSKI: 85.

THE COURT: The Surgeon General report referred to are introduced here by stipulation of all the parties.

MR. KACZYNSKI: I'll read it to the jury. Bottom of 85.

Q "The incorporation into the tobacco blends of reconstituted tobacco sheets expanded tobacco", which we haven't talked about yesterday, "and tobacco ribs has contributed to a selective reduction of PAHs."

That is polycyclic hydrocarbons in cigarette smoke?

A That is exactly why I wanted to have it read. You see, the ribs or the stems, if you put them in alone without going through the sheet does the same thing. That is the point I wanted to make.

It's not that the reconstituted tobacco is magic compared to just using the stems.

Q Cigarettes using reconstituted tobacco have significantly lower benzo(a)pyrene than average cigarettes;

isn't that right?

A I think that is right and it's also true of just the stems alone.

Q And lowering BAP is a good thing?

A That's correct.

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Q The tobacco working group, I think we discussed this, this is one of the processes they tested on the backs of mice; correct?

A Yes, it is.

Q And cigarettes made with reconstituted tobacco sheet produced fewer tumors or less tumorigenicity than the Kentucky reference cigarette?

A I think again that is also true of stems. If you incorporate stems you get a lower reaction than the Kentucky reference cigarette.

Q The answer regarding reconstituted tobacco sheet is that cigarettes -- that the testing of reconstituted tobacco sheets on the backs of mice produced fewer tumors or less tumorigenicity than the Kentucky cigarette?

A Not an advance, but yes I agree with your statement.

Q Expanded tobacco was invented by R.J. Reynolds; wasn't it?

A I think R.J. Reynolds may have had the first

patent on it. I'm not sure who invented it.

Q Fair point. About --

THE COURT: Your comments are as bad as --

The jury will strike it. This is not a conversation. This is a question and an answer.

Q Using the phrase "expanded tobacco", I think you explained to the jury yesterday sort of a misnomer.

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What you're really doing is because a tobacco leaf when it's brought in from the field dries, what you're doing is restoring it to the size it had been in the field?

A That is what I said yesterday.

Q When you do that and put it in a cigarette it takes up more space than the leaf otherwise would?

A That is correct.

Q The use of expanded tobacco results in lower tar and nicotine in a cigarette; correct?

A Yes.

Q And the use of expanded tobacco in cigarettes tested by the tobacco working group with expanded tobacco on the backs of mice produced fewer tumors or less tumorigenicity than the Kentucky reference cigarette in their testing; correct?

A Experimental cigarettes, yes.

Q You asked me before for the chart from the '89

Surgeon General report. I'm going to show you it. It's on page 88. Take a look at that.

MR. KACZYNSKI: Let's put it up on the screen. Page 88.

Q Doctor Farone, is what is on the screen proximate what you're looking at on the pages in front of you?

A Yes, it does.

Q What this chart shows is the tar and nicotine levels beginning in approximately 1957; correct?

A Yes.

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Q Going down to approximately 1987?

A Going down to about 1980.

Q Well, the chart goes from 57 to 87?

A The chart does, but the reductions only go to 80.

Q This chart shows, would you agree, that these are the approximate dates of introduction of the various design changes in American cigarettes?

A Yes, I do.

MR. KACZYNSKI: I would like to show to the Court and counsel Plaintiff's exhibit 1105, which is in evidence.

Your Honor, may I display this to the jury? This is in evidence.

THE COURT: Just tell me what that 85 on top

means.

Q Doctor Farone, when a Salem 85 -- what does the 85 mean?

A 85 millimeters in length.

THE COURT: Thank you. Now you may.

MR. KACZYNSKI: Let's put it up.

THE COURT: Any evidence that is what he smoked?

MR. KACZYNSKI: That is what he smoked. I don't think it's been contested. He did not smoke Kings 100s or Lights.

THE COURT: Got you. That is the regular King

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size in '86 -- the 85?

MR. KACZYNSKI: Yes.

Q This is in evidence, Doctor Farone.

Shows approximately thirty-five milligrams of tar back in about '55 in a Salem?

A Yes.

Q Reduced down to 1993 of something on the nature of maybe seventeen milligrams of tar?

A Reduced down to seventeen looks about 1975.

Q If we go to the end of the chart we are winding up at about seventeen milligrams of tar?

A Yes. After it goes down it goes back up again.

Q The nicotine level begins somewhere of let's say approximate about 3.2 milligrams in 1955?

A Approximately correct.

Q That is reduced down to approximately, would you say, one-and-a-quarter milligrams in 1993?

A Minimum C.9 in 1980 and came back up again.

Q The same rough tar and nicotine reductions you saw for cigarettes overall you also saw in Salem; correct?

THE COURT: Where did this come from.

MR. KACZYNSKI: Plaintiff's exhibit that we didn't object to.

Q As a matter of fact, Doctor Farone, the most dramatic -- yesterday you were talking about some isolation studies that were done by Doctor Rodgman or literature used by Doctor Rodgman in late fifties, early sixties. Do you

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recall that?

A Yes.

Q The period of the greatest reduction of tar and nicotine, was it about the same time in the late fifties, early sixties; isn't that true?

A Yeah. The reductions are what they show on the charts. I don't disagree with what they are. I just disagree with what it means.

MR. KACZYNSKI: You could take that down.

Q Currently in the market today Reynolds offers its customers a wide range of tar and nicotine level products; is that true?

MR. FINZ: Objection. Objection. Objection. We are going beyond 1993.

Q As of 1993 Reynolds offered its customers a wide range of tar and nicotine levels in its products. That is true; isn't it?

A Yes.

THE COURT: Do you know?

Q The lowest is now; correct?

A The brands now is Reynolds lowest, yes.

Q From --

THE COURT: The lowest what?

THE WITNESS: Tar.

MR. KACZYNSKI: Tar and nicotine.

THE COURT: Is it tar and nicotine?

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THE WITNESS: I'm not quite sure of the nicotine. I'm sure about the tar.

Q What is the approximate tar measurement now?

A Depends on which one we are talking about. There is more than one now.

Q Right.

A I think one of them has about four milligrams of

tar and about three tenths -- four tenths of nicotine.

The other has one milligram or so, nine tenths of tar, might be lower. Maybe at one point it was point five milligrams of tar and about one tenth of nicotine.

Q If we hearken back to where we started talking about an average roughly thirty eight milligram of tar cigarettes in the fifties, that is a substantial reduction; right?

A Yes. It's a reduction, but it's not meaningful.

Q The answer is yes, it's a substantial reduction?

A It is a substantial reduction, the answer is yes.

Q Let's talk about benzo(a)pyrene.

Benzo(a)pyrene is a carcinogen at large doses; correct?

A It's a carcinogen in any doses as far as I'm aware.

Q Benzo(a)pyrene is found in grilled foods?

A Yes.

Q It is found in charcoal steak?

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A I don't inhale, yes.
Q The answer is yes?
A It's found there, but the relevance to a cigarette I don't understand.

Q Also found in the air we breath?
A To a very, very tiny safer level. It's much lower.
Q The answer is yes?
A Not in all the air we breath.
Q If we are walking down a New York City street we are inhaling benzo(a)pyrene; aren't we?
A New York City street, probably you are. Country you are not.
Q The fact that benzo(a)pyrene is in cigarette smoke has not been a secret since the late fifties; correct?
A That is correct.
Q In fact --
THE COURT: A secret to who?
MR. KACZYNSKI: The public.
MR. FINZ: I'll object. Secret to the public, no foundation to that.
THE COURT: Sustained.
Q Benzo(a)pyrene in cigarette smoke has been written about since Reader's Digest in 1959; isn't that correct?
A Approximately, that time.
Q The selective reduction of benzo(a)pyrene has been

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studied since the fifties?

MR. FINZ: Excuse me, may we approach on this

one?

(Discussion held at the bench, off the record.)

Q Now, one of the methods that was used you mentioned earlier to try to reduce benzo(a)pyrene from cigarette smoke is hexane extraction; correct?

A No. I think you're confused.

Q One of the methods that R.J. Reynolds used to reduce or eliminate benzo(a)pyrene in cigarette smoke was called a hexane bath; isn't that correct?

A You're extracting tobacco with hexane for the purpose of eliminating materials which will produce benzo(a)pyrene in the smoke. You're not actually extracting the smoke.

Q You're working on the tobacco?

A Yes.

Q By 1957 it was generally recognized that hexane extraction wasn't going to work; isn't that correct?

MR. FINZ: Objection.

THE COURT: Rephrase it counsel.

Q You are familiar with the name Ernst Wynder; correct?

A Yes.

Q He is a prominent cancer researcher?

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A Yes.

Q Authoritative on the subject of smoking and health?

A Yes.

MR. KACZYNSKI: A-826.

This is an exhibit that was not objected to, your Honor, and I move its admission at this point.

MR. FINZ: We object to this. No foundation.

MR. KACZYNSKI: Look at the last page.

MR. FINZ: Okay. Let me withdraw that please. I'll withdraw that.

THE COURT: There is no objection.

MR. FINZ: I withdraw my objection.

MR. KACZYNSKI: Put it up on the screen for Court and counsel.

THE COURT: Go ahead.

MR. KACZYNSKI: Can I show it to the jury?

THE COURT: Yes, you can.

Q Doctor Farone, this is the first page of a document entitled Papers Presented at the 51st Annual Meeting of the American Association for Cancer Research, Chicago, Illinois, April 8-10 1960.

Do you see that, sir?

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A Yes.

Q The object of the memorandum is to outline papers presented at the 51st annual meeting of the American Association for Cancer Research in Chicago, Illinois on April 8-10, 1960. See that sir?

A Yes, I do.

Q Reading from page ten of the document.

"Attempts were made by Wynder's" -- that would be Doctor Ernst Wynder?

A Yes.

Q "By Wynder's group to reduce the polycyclic hydrocarbon contents of cigarette smoke and thus reduce the so-called initiating agent which is necessary for the promoting agent to exert its action.

"The extraction method, which on the basis of the results of animal and chemical studies was moderately effective, was ruled out by Wynder as being impractical both technically and economically."

Do you see that, sir?

A I see what it says. I don't agree, but I see it.

Q Apparently, that was the opinion of Doctor Wynder?

A Yes, but I disagree with his opinion.

Q It was also discovered, was it not, that hexane extraction actually increased the phenol content of

cigarette smoke.

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Do you recall seeing that in Reynolds documents?

A Not specifically, but I don't disagree with that. I just don't recall seeing it.

MR. KACZYNSKI: This is Plaintiff's 1064 in evidence.

Q Since this is my one copy we will read it together.

Author is Allen Rodgman, February 12, 1964.

Subject is the analysis of cigarette smoke condensate XXXV, summary of an eight-year study.

If we flip to page 61.

MR. FINZ: May we have a moment until we retrieve that document?

THE COURT: Absolutely. 1054?

MR. KACZYNSKI: 1064.

THE COURT: Didn't we have this one before? Is this a different one?

MR. KACZYNSKI: We have had it before. He had it on his direct. Page 61.

THE COURT: Again, I remind the jury that this is only admitted as against -- that was your company?

MR. KACZYNSKI: Yes, sir.

Are we ready?

Q This would be paragraph 3A, pretreatment of

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tobacco by solvent extraction.

"Solvent extraction of tobacco reduces the polycyclic hydrocarbon content of the cigarette smoke. The extraction increases the phenol content of the smoke."

Do you see that Doctor Farone?

A I do. Are they talking about hexane?

Q Hexane is a form of solvent extraction?

A So is water. So is carbon dioxide. You have all kinds of forms.

THE COURT: Counsel, I would like to take a break. Counsel, I would like to take a break.

MR. KACZYNSKI: Take a break, sure.

THE COURT: The jury is on a break.

(The jury leaves the courtroom.)

(A short recess is taken.)

(Whereupon, Robin Bates replaced Judith Brusca as Court Reporter.)

COURT OFFICER: Jury entering.
COURT CLERK: Please be seated, folks.
MR. KACZYNSKI: May I proceed?
THE COURT: Yes.
MR. KACZYNSKI: Welcome back.

Q. Doctor Farone, you are familiar with a product that Reynolds put on the market called Premier, correct?

A. Yes, I am.

Q. And is this a pack of Premier?

A. Yes.

MR. KACZINSKI: Your Honor, with your permission I'll just sit it here.

THE COURT: Absolutely.

Q. Premier was a product that was developed

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over a period of time from about 1982 to 1988, is that correct?
A. Not sure of the date but approximately.
Q. Roughly it came out in the late eighties?
A. '88 or '89, yes.
Q. Premier, from your prospective, you called it the ultimate low tar product?
A. Well, as of the time that it came out it was the ultimate low tar product but other products have
2767
come out since then.
Q. Premier delivers virtually no tar, can we agree on that?
A. Well, Premier still delivers a lot of chemicals that are carcinogens. In your publications of your report you list them.
Q. But my question was Premier delivered virtually no tar, that's right, isn't it?
A. Well, to me, tar is everything that isn't nicotine. So, to me, it can't didn't get collected on the pad. Some of the stuff went through. It's very low in tar, I think we can agree on that.
Q. That because the concept of Premier was that it heated rather than burned tobacco?
A. That's correct.
Q. So the by product of burning was not present in that product?
A. The by product of burning from the combustion or pyrolysis of the tobacco, what may have been formed during the curing process went there, correct. You're not combusting or pyrolysing the tobacco.
Q. That's right. Of those two functions you described to the jury yesterday, pyrolysis and
2768
combustion, neither one of them took place in Premier?
A. Pyrolysis, maybe to a tiny extent, but virtually not.
Q. Premier was a massive effort by R.J. Reynolds, you would agree with me on that, wouldn't you?
A. I can agree it was a large effort. I don't know how massive it is because I have not seen the budget.
Q. It's been reported that Premier was on the neighborhood of three quarters of a billion dollars.
MR. FINZ: Your Honor, I object to that and I ask that remark be stricken.
THE COURT: Sustained. So indicated.
Q. Reynolds obtained a large number of patents in the process of Premier, you're aware of that?
A. Yes.
Q. Somewhere in the neighborhood of forty patents in just in the technology alone?
A. Around thirty.
Q. Reynolds did a number of biological testing on Premier, is that correct?
A. Yes, that's correct.
Q. They did some biological testing in-house and some biological test at outside labs?
2769
A. Yes, that's correct.
Q. And the results of those tests were compiled in a seven hundred page book, that's correct, isn't it?

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A. First time Reynolds published --
Q. The answer to my question is yes?
A. Yes.
MR. KACZYNSKI: This book which Your Honor -- it's actually Plaintiff's Exhibit 1099 and Defendant's Exhibit A 2448.
THE COURT: How do I deal with the same item being offered twice?
MR. KACZYNSKI: I think the Plaintiff's version -- I don't know if it got fixed. A couple of pages were missing. I do know our version is complete. It wasn't objected to. I move its admission.
THE COURT: Fine.
COURT CLERK: As a Defendant's Exhibit?
THE COURT: Yes, as a Defendant's Exhibit.
COURT CLERK: That's Exhibit 2448.
Q. Reynolds gave the result of its biological testing to a peer review committee for review, you're aware of that?

2770

A. I am not sure what you're referring to. I understand they gave results to a peer review committee. It's biological testing. I'm not sure what you mean.
Q. The results that are compiled in this seven hundred page book were provided to a committee on which incidentally sat Dietrich Hoffman?
A. That's correct. The point I am making, there are results in there, I believe from my recollection, that are withheld.
Q. Sir, take a look at page two in the summary portion of this exhibit. It sets forth the product objectives for the new cigarette.
You know the new cigarette became Premier?
A. Yes.
Q. Let's go through them. To provide the following: To provide the tobacco taste and smoking pleasure of other cigarettes as demanded by smokers and to the degree possible. (A) to simplify the mainstream and side stream smoke chemistry by eliminating or reducing compounds produced by burning tobacco.
You see that, Doctor Farone?
A. Yes.
Q. That's a commendable objective, isn't it?
A. It's an objective, yes.

2771

Q. It's a responsible objective?
A. Yes.
Q. And Reynolds succeeded in this objective, didn't it?
A. Not in my opinion.
Q. Let's take a look. Take a look at Page 151 -- sorry. Chart from 151. Title: Chart is New Cigarette Prototypes that Heats Instead of Burn Tobacco, and it has a number of compounds listed, correct?
A. Yes.
Q. Reading across the top what it basically does in laymen's terms it looks at the percentage change of various compounds from the Kentucky reference cigarette to Premier, correct?
A. That's correct.

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Q. Okay. And if we run down the right hand column we'll see that more than 99.9 percent of hydrogen cyanide was removed in Premier?
A. That's correct.
THE COURT: Is that a carcinogen?
THE WITNESS: No.
THE COURT: Why are we talking about non-carcinogens for?

2772

Q. Let's go down to the nitrosamines, NN nitrosamine, correct.
A. That's correct.
Q. And NNN we here have a 91.6 percent reduction, correct?
A. Yes.
Q. NNK is a nitrosamine and in Premier there was a 97.1 percent reduction, correct?
A. Yes.
Q. NAT is a nitrosamine, correct?
A. Yes.
Q. And there was a ninety percent reduction in NAT, correct?
A. Yes.
Q. And NAB, also a nitrosamine?
A. According to the chart.
Q. 93. 9 percent reduction, correct?
A. Yes.
Q. I see we have benzo(a)pyrene sitting on top of the nitrosamines and there was a 99.1 percent reduction in benzo(a)pyrene, correct?
A. I'm referring to the chart, that's correct.
Q. On top of that is benz(a)anthracene. Is that a carcinogen?

2773

A. Yes.
Q. I believe you mentioned that yesterday, a polycyclic aromatic hydrocarbon?
A. Yes.
Q. There was also a ninety-nine percent reduction in benz(a)anthracene, right?
A. Yes.
Q. If we go down to phenol which is about two-thirds of the way down the chart, that's another one of the bad guys you were talking about yesterday, right, Doctor Farone?
A. Phenol is a promoter.
Q. But it's a bad guy?
A. Yes.
Q. Would you like to see it eliminated from tobacco smoke?
A. Yes.
Q. Here we have a ninety-six percent reduction.
MR. KAZYNSKI: Now, the second product objective, let's put it up. Can you display it to the jury, please.
Q. The second project objective is to minimize the potential for biological activity as measured by toxicological assays and tests frequently used to

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study cigarette and cigarette smoke.
That is a responsible objective, is it not, Doctor Farone?
A. Yes.

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Q. And Reynolds met that objective, is that right?
A. I don't understand what you mean by met the objective.
Q. Premier produced less toxicological and biological activity than the Kentucky reference cigarette and the test was conducted inside and outside R.J. Reynolds?
A. Basically on the test results.
Q. And the final objective is to minimize environmental tobacco smoke.
Will you agree that's a responsible objective?
A. Responsible?
Q. That was an objective that was met with Premier, was it not?
A. There was very much less if that's what you mean by minimize. There's very much less of all of these things.
Q. It was nicknamed the smokeless cigarette at
2775
the time it came out, is that right? People referred to it that way?
A. Newspaper articles. I don't know that people in the industry referred to it that way.
Q. You expressed the opinion that Premier was a step in the right direction toward developing a safer cigarette, correct?
A. I have, yes.
Q. Reynolds put Premier into the test market in the fall of 1998, does that sound about right to you?
A. I am not exactly sure but you're about right.
Q. When they did that first thing was it a failure in the test market, can we agree on that?
A. Didn't end up being sold and attracting a great number of customers, yes.
Q. Smokers found it was tasting funny and it was hard to light. Did you hear those complaints?
A. I didn't hear that but I recall reading about people giving those complaints, yes.
Q. And Premier was attacked by people like the Surgeon General of the United States, isn't that correct?
A. There was some concerns about claiming that
2776
it was safe, if you didn't have real good epidemiological proof it was safe.
Q. In fact, Reynolds never claimed it was safe in its advertising, did it?
MR. FINZ: Objection.
THE COURT: Counsel, why are we talking about this? That's sustained.
Q. Is it safe to say in summary the public health community did not welcome Premier on the market?
MR. FINZ: Objection.
THE COURT: Sustained.
Q. The American Medical Association sort to have Premier banned from the market, isn't that correct?
MR. FINZ: Objection.
THE COURT: Sustained, counsel. All irrelevant.
Q. Are you familiar with the name Doctor

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Michael Russell?
A. The name, yes.
Q. Doctor Michael Russell is a cancer researcher in Britain?
A. Great Britain. UK.
Q. He's written on cigarette design issues from time to time?

2777

A. Yes, I've seen some of the articles.
Q. And you know from your review of Reynolds documents that Doctor Russell wrote a letter to the director of Research and Development at Reynolds about Premier, do you recall seeing that, Doctor Farone?
A. Not specifically, no.
MR. KACZYNSKI: Your Honor, there is a Defendant's Exhibit A 2374. It was not objected to.
May I display it to the jury, Your Honor?
THE COURT: Is there something here?
MR. KACZYNSKI: May I display the letter to the jury, Your Honor?
MR. FINZ: Your Honor, I'm going to object to this.
MR. KACZYNSKI: Your Honor, can we approach?
(Whereupon there was a side bar discussion held off the record.)
THE COURT: Overruled.
MR. KACZYNSKI: This is a letter to Doctor Carl Ehmann, Research Director at R.J. Reynolds dated 7, May, 1993. It's from Doctor -- although it doesn't appear on this

2778

page -- can we go to page two.
MR. FINZ: Your Honor, if we are going to read it, objection. Can I ask that the entire letter be read?
THE COURT: You may read the rest of the letter.
Q. On page two you see it's signed by Doctor Russell. That's the Doctor Russell we just discussed, isn't it Doctor Farone? Doctor M A H Russell?
A. Yes.
Q. Let's go back to the beginning. It says from Doctor Russell to Doctor Ehmann. I have had a long standing interest in your Premier cigarette and did have a number of meetings in the past with Doctor Wallace Hayes.
And you know Doctor Wallace Hayes was a research scientist at R.J. Reynolds?
A. Yes.
Q. Basically I think the Premier has tremendous potential for low risk long-term nicotine use and the response to it in your country was political and irrational. I write because in my view it would be very sad if you were to abandon further development of --
MR. FINZ: This is being read totally out

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of context.
THE COURT: You'll read the rest of it.
MR. FINZ: But --
THE COURT: Counsel, I've already told you this.

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Q. I write because in my view it would be very sad if you were to abandon further development of such a potentially valuable product.
Am I reading it correctly, Doctor Farone?
A. Yes.
Q. In fact Reynolds did not abandon the pursuit of such a product that heated rather than burned tobacco, did it?
A. You mean with regard to Eclipse?
Q. Yes.
A. The key feature in Doctor Russell's paper is the augmentation of nicotine.
Q. Was the answer to my question yes, that Reynolds did not give up on a product that heated rather than burned tobacco?
A. They gave up on augmenting it with nicotine.
Q. Doctor, is the answer to my question that Reynolds did not give up on a product that heated rather than burned tobacco?

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A. On that specific issue, yes. They have another product that heated but does not burn tobacco.
Q. And that's called Eclipse?
A. Yes.
Q. And it was introduced in the early 1990's in the test market, is that correct?
A. Yes.
Q. Eclipse is being test marketed?
A. It was test marketed. I don't know if the test market is still ongoing.
Q. You know --
MR. FINZ: Your Honor, may we establish a date, please?
MR. KACZYNSKI: We already did. Early 1990's.
MR. FINZ: Is it post '93 or before '93, Your Honor?
Q. Do you know, Doctor Farone?
A. No.
MR. FINZ: I object unless we can establish a date.
THE COURT: Sustained.
Q. Another project --
MR. FINZ: May we have that removed, Your

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Honor, please, because it's not in evidence.
MR. KACZYNSKI: Actually, Your Honor a pack of Eclipse was marked and not objected to.
COURT CLERK: Are you introducing that, sir?
MR. KACZYNSKI: Yes. I don't know what the number is at the moment.
Q. Another project that Reynolds has undertaken is designed to prevent tobacco, specifically nitrosamines from forming.
You're familiar with that, correct, Doctor?
A. Are you referring to the air curing, the curing test?
Q. Yes.
A. Yes.
Q. What happened when tobacco was first harvested it's called green tobacco tobacco, is that

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right?
A. That's correct.
Q. And would you agree tobacco it has low levels of nitrosamines?
A. That's correct.
Q. After the tobacco, and you discussed some of
2782
this yesterday, we'll go through it quickly, after the tobacco was harvested it has to be dried or flue-cured?
A. That's correct.
Q. And it's in the process of drying or flue-curing that nitrosamines can form, correct?
A. That's correct.
Q. So one way to reduce nitrosamines is to try to affect a formation during the drying and curing process?
A. That technology has been available since the fifties and sixties.
Q. Scientists at Reynolds have found a way to affect the drying and curing process and are sharing it with tobacco farmers today?
A. I don't know if they're sharing it today. It was shared by Philip Morris scientists back in the early '80's, late '70's.
Q. Reynolds purchased instrument equipment that farmers could use in the drying and curing process to prevent the development of nitrosamines, you are aware, of that?
A. They purchased equipment, no.
Q. They provided it to farmers?
A. I was aware there was some arrangement of
2783
equipment but I didn't realize that Reynolds purchased equipment.
Q. Assume that Reynolds purchased the equipment.
Further assume that Reynolds provided it to tobacco farmers.
A. Okay.
Q. Further assume, and Your Honor this will all be tied up in the defense case, further assume that Reynolds has provided tobacco to farmers with financial assistance to buy the equipment.
Assuming all that's true is that a responsible thing for Reynolds to do?
MR. FINZ: I object to the form of the question, Your Honor. Responsible. It could be a business reason to do it and a profitable --
THE COURT: Counsel, I have asked you to stop making these comments. I seem to be losing the battle.
MR. FINZ: Forgive me, Your Honor.
THE COURT: You've been doing it all afternoon after I have cautioned all the attorneys this morning, at the end of the
2784
morning.
MR. FINZ: Your Honor, I object to the form of the question.
THE COURT: Sustained.
Q. With all those --
THE COURT: Responsibility is not an

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issue in the form you ask.
Q. With those assumptions in mind, Doctor Farone, is that a reasonable thing for Reynolds to do?
MR. FINZ: Objection.
THE COURT: I'll allow it. Reasonable in regard to increase safety of the consumer.
Q. Is it reasonable in regard to increase safety of the consumer?
A. Only to the extent you can prove it will reduce the carcinogens in doing that. If you're not going to test the product that you're finished with making it may not be reasonable.
Q. Reducing nitrosamines is a good thing, right, Doctor?
A. Yes.
Q. And if this reduces nitrosamines that is a good thing, correct, Doctor?
A. Only if it reduces them to an effectively

2785

low level that does not cause cancer. That's my big problem with good, better, best. It's got to be good enough that you can show it reduces the numbers of cancer; otherwise, it's not good enough.
Q. And the only way you're going to find that is with epidemiological study?
A. No. That's the ultimate way but you can find it out through a series of tests of the finished product, the way as it's been done for Premier. You can see whether or not use that in Winston or Salem it would cause you to have a product of less risk.
Q. The only ultimate product of safety is an epidemiological study?
A. Yes.
Q. You didn't mean to suggest to the jury the other day that Reynolds or the other tobacco companies did not do biological testing of their products, did you?
A. No. I am talking about animal testing, all animal testing.
Q. Because you know that, for example, during the 1960's Reynolds contracted with Industrial BIO-TEST Labs to conduct biological tests?
A. Yes, I'm aware of that.

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MR. KACZYNSKI: Defendant's Exhibit A 1214 is an exhibit that was not objected to during the objection process.
I move its admission at this time.
THE COURT: So indicated.
MR. KACZYNSKI: Put it up on the board, please.
Q. This is a memorandum dated May 26, 1965 to Doctor W. M. Bright and Doctor Murray Senkus and from the last page, if we can, this is from Doctor Eldon Nielson.
These are all names you've seen in Reynolds documents that you reviewed?
A. The names, yes.
Q. And the subject is Industrial BIO-TEST Laboratories?
A. Yes.
Q. And if you just look at the beginning of the second paragraph what they're doing is ciliastatic

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assays, biological testing of ten brands of cigarettes.
You see that, Doctor, ninety days toxicity study?
A. It's not cancer test.
Q. It's a biological test?

2787

A. Yes.
Q. Thank you. Take it down.
MR. KACZYNSKI: Your Honor, Exhibit 3024 is a document that's not been objected to and I move its admission at this time.
THE COURT: So indicated, 3024
MR. KACZYNSKI: Put it on the screen, please.
Q. The author of this document is Industrial BIO-TEST Laboratory, Inc. North Brook, Illinois. Mr. J. C. Calandra dated December 15, 1965. Interim report number nine to R.J. Reynolds Tobacco company, the smoking machine.
THE COURT: What date did you say?
MR. KACZYNKSI: December 15, 1965
THE COURT: I thought you said '69.
MR. KACZYNSKI: No, '65. The interim report number nine to R.J. Reynolds Tobacco Company, the smoking machine. In-vivo studies of affects of tobacco smoke.
Q. First, what are in-vivo studies?
A. In animals in living systems whole animals in-vivo tobacco is like petridishes.
Q. This document I'll just read the summary.

2788

Smoking machine for the in-vivo studies of ciliastatics, and ciliastatic affects mean that the paralyzing of the little hairs, that, for want of a better word, that lines your esophagus?
A. Yes.
Q. The ciliastatic affect of tobacco smoke is briefly described. The schematic diagram of the machine and of the electrical currents are presented. This machine has been successfully used in the in-vivo studies.
Ciliastatic affect of tobacco smoke on the cat's trachea, you see that?
A. I see that. I don't see any results from any significant --
Q. Doctor Farone, in addition to contracts with IBT in the 1950's Reynolds also contracted with IBT again in the 1970's.
Are you familiar with that from your review of the documents.
I seen documents, yes.
MR. KACZYNSKI: 796.
Your Honor, this was not objected to and I move its admission at this time.
THE COURT: So indicated.

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MR. KACZYNSKI: Could we put it up on the screen, please.
Q. It's a bill. 1970. This is from Industrial BIO-TEST Laboratories, Inc. dated November 25, 1970 and the subject is R.J. Reynolds billing.
THE COURT: I note my surname. I am unaware of this person.

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Q. And this is biological testing, is it not?
A. No. There is no evidence that this represents the testing of any final product, cigarette.
Q. I ask you that this constitutes biological testing, doesn't it?
A. That's not what I testified to at all, biological tests. I'm talking about finished product.
Q. I am asking does this represent a bill for biological testing? Is the mouse skin painting biological testing?
A. Yes, that's a bill for biological testing.
Q. Mouse skin painting study is biological testing, isn't it?
A. Mouse skin painting study is biological testing but that hasn't been my testimony.
Q. Inhalation exposure of rats to N 0 2 is biological testing, isn't it?

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A. Yes.
MR. KACZYNSKI: Take it down. We already discussed that.
Q. Oh, Reynolds Ames testing is biological testing?
A. Ames is in-vivo tobacco testing, yes. Ames is in-vivo.
MR. KACZYNSKI: Could I have A 2624.
Your Honor, A 2624 was an exhibit that was not objected to and I move its admission at this time.
THE COURT: So indicated.
MR. KACZYNSKI: Put her up.
Q. There are authors Chin K. Lee and Elizabeth A. Reed and you know those to be Reynold scientists, correct, Doctor Farone?
A. I may have seen the name. Right now I don't recall.
Q. Dated May 9, 1983
A. Yes, I see that.
Q. And the title of the report is "Ames Test on Smoke Condensates -- A Summary."
Is that the title?
A. That's the title.

2791

Q. And the summary, I'll just read it, says this memorandum summarize all the interoffice memoranda written by the authors since 1978 to date.
That would be about five years on Ames testing of cigarette smoke/condensates and/or specific smoke condensate components.
The memos written on Ames testing of tobacco flavorants are not included in this summary. Status: This work is complete.
Did I read that correctly, Doctor Farone?
A. Yes, you did read it correctly.
Q. And you know from this book that Reynolds talked biological testing in-house and outside laboratories on Premier?
A. Only thing I know is that Reynolds conducted biological testing on Premier, not on any other products.
Q. And my question was Premier, wasn't it, Doctor Farone?
A. Yes, it was.

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Q. Thank you.
Speaking of testing you know Reynolds has developed a technique that can utilize whole smoke for certain kinds of tests? The cellulose smoke exposure

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technique?
A. Yes.
Q. Developed by a scientist at Reynolds?
A. Yes.
Q. It allows a scientist to use whole smoke condensates and certain kind of biological tests?
A. That's one of the tests.
Q. There is no standard today for what constitutes a safe cigarette, is that right?
A. I'm afraid I don't understand the question.
THE COURT: Neither do I.
Q. For example, has the Surgeon General of the United States given a formula of what would constitute a safe cigarette?
MR. FINZ: Objection.
THE COURT: Sustained.
Q. Is there any formula generally recognized in the scientific community that would constitute a safe cigarette?
MR. FINZ: Objection.
THE COURT: I'll allow that.
Is there any formula that's generally accepted, counsel, in the scientific community about what constitutes a safe cigarette?

2793

THE WITNESS: There is, yes. It's one that would cause no harm. That is a definition of a safe cigarette generally accepted by any scientist that --
Q. What are the components of the cigarette that is generally accepted to cause no harm?
A. Components --
THE COURT: Sustained as to form.
If any.
Q. If any.
A. As far as I know there are no definition of components. Simply the statement that thou shall do no harm with the product.
Q. There is no --
THE COURT: I don't think you answered the question. I'd like an answer to the question.
A. Repeat the --
THE COURT: What components, if any, would constitute a safe cigarette?
THE WITNESS: And my answer was only those components which would do no harm.
THE COURT: Right, but -- okay.
Q. What are they?

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A. They would be things like low levels of things that have been tested for inhalation. Glycerin, low level. Possibly menthol without the nicotine because that's already used in inhalers and throat treatment. We have to go through and look up the list to find out the toxicology for various ingredients and pick off those that would not cause any harm.
I don't remember all of them but given a

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reference book on the allowable levels in air of chemicals I can describe to you a series of compounds all of which you can use to describe for you further the levels at which you can use it. It would be a tenth of a milligram for one and --

Q. You could do that but you haven't done that, have you?

MR. FINZ: Objection. Argumentative.

THE COURT: Sustained.

The issue is not whether he has or can. The issue, folks, is about Salem cigarettes during the period '63 to '93 plus the others but --

Q. In the period '63 to '93 isn't it true, Doctor Farone, that there is no standard for a safe cigarette that was generally recognized in the

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scientific community apart from one that doesn't hurt you?

MR. FINZ: Objection.

THE COURT: I'm having a problem here. Come up.

(Whereupon there was a side bar discussion held off the record.)

THE COURT: That's sustained.

Q. Considering the period 1963 to 1993 was there a generally accepted definition in the scientific community of what would constitute a safe cigarette assuming that cigarettes burned tobacco?

THE COURT: I'm having a problem with this one too. Let me see if I understand your testimony.

During that period -- the issue is whether the cigarettes that were put on the market and used by this plaintiff were in fact safe and I think you've given us testimony.

THE WITNESS: Correct.

THE COURT: The issue is what if anything could be done to that product to -- within the technological feasibility of the state of science, during that period of time, as an

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alternative word you're looking for.

MR. KACZYNSKI: Your Honor, I'm looking for some standard in the scientific community in the government, academia, somewhere, what is safe for cigarettes apart from one that doesn't hurt you. What components.

THE COURT: Maybe that's the ultimate question. I think we have a problem here. I don't know how you're going to phrase it. I think my attempts are better left unattempted.

MR. KACZYNSKI: Okay, Your Honor.

Q. It's the position of the Surgeon General of the United States there is no such thing as safe cigarettes?

MR. FINZ: Objection.

THE COURT: That's fair. Is that the position?

THE WITNESS: Of the Surgeon General, yes.

THE COURT: I don't know I don't want to be precinct Dan that but [AEPL] going to be

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that means made out of life tobacco tobacco?
THE WITNESS: Correct.
THE COURT: We're using the word
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cigarette but I'm assuming that we're talking about the tobacco with a tobacco component.
THE WITNESS: Surgeon General is referring to conventional cigarettes.
THE COURT: One made out of tobacco.
MR. FINZ: I withdraw my objection.
THE COURT: A cigarette may or may not necessarily be made of a tobacco component. Is everybody with me? I want to make sure that we are talking about the same thing, okay.
MR. FINZ: On that basis I withdraw my objection, Your Honor.
THE COURT: Go ahead, rephrase your question.
Q. Actually it's the position of the Surgeon General of the United States that there is no such thing as safe cigarettes made of tobacco, that's right, isn't it?
A. Yes.
Q. Now yesterday you talked a little about what your definition of a safer cigarette might have been prior to 1969.
Do you recall that, Doctor Farone?
2798
A. My definition?
Q. How to make cigarettes safer prior to 1969.
A. Yes, but it wasn't a safer cigarette.
Q. Option number one was to end in shorthand tell knee I am being unfair was to going to the cigarette of approximately 1910 thereabouts is that rights?
A. Go back to the design characteristics, yes.
Q. Now, Doctor Farone, I want you to assume --
THE COURT: May I ask a question?
MR. KACZYNSKI: Yes, Your Honor.
THE COURT: We have had testimony previous to your appearance of a -- I think it's a statistical of some twenty to thirty years between the onset of use and the onset of lung cancers and I didn't ask it at the time but this may be --
MR. KACZYNSKI: You want the quote? I got the testimony right here.
THE COURT: I took --
MR. KACZYNSKI: You stole my thunder but go ahead.
THE COURT: I'm trying to correlate your testimony, if possible, with the testimony of
2799
the previous witness and see if I can get an explanation of that lag time and your statement. Can do you that?
THE WITNESS: I think I can.
THE COURT: Was that your question?
MR. KACZYNSKI: Yes, Your Honor.
Q. I would ask you assume Doctor Alan Feingold sat where you sat last week and gave the following testimony. And this is page 1503 of the record. Doctor

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Feingold said and disease in the time was not just a fixed time, twenty or thirty years but it was again consistent in every study that was done. Every time it was looked at was the same business. Twenty to thirty years after people start smoking after that when they get lung cancer.

Assuming Doctor Feingold differed to that, isn't it true Doctor Farone that your cigarette of 1910 would have been responsible for the lung cancers of the 1940's?

A. No, because he said it's ten to twenty years. The reason I picked 1910 is because the first time, from my understanding of the history and literature, the first time that we saw a lung cancer was rather in 1918.

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THE COURT: We heard that and every jurors remembers it, right?

A. We got 1920, 1919 one very rare -- one or two cases. I am talking about a cigarette in 1910. Now when you go into the twenties and thirties you will begin to see that in the thirties, and that's when we started to see the DeBakey experience. All of the people started to say that this is causing lung cancer.

Q. Big epidemiological studies initially came out in 1950, did they not?

A. Yes, but I am not going -- I'm going by what representable science have claimed including Doctor DeBakey starting in '36, '37, and if you back up from there, that appropriate period of time, you end up in 1910.

Q. So the lung cancers of 1936 are caused by the smoking in 1906 with a thirty year latency period if I'm doing my math right?

THE COURT: He's looking in 1910 because that's the medium period, am I right?

THE WITNESS: Yes.

Q. The cigarette of 1910 had no filter, did it?

A. No, it didn't have filter.

Q. Didn't have expanded tobacco?

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A. Did not.

Q. Did not have porous paper?

A. Did not.

Q. Did not have reconstituted tobacco?

A. That's correct.

Q. Had a very high tar level?

A. Yes.

Q. Very high nicotine level?

A. That's correct.

Q. No public health authority has ever suggested going back to the cigarette of 1910, isn't that right?

A. You forgot some of the properties. You couldn't inhale it.

Q. So one of the things that was required for a safer cigarette under the definition you gave was an uninhalable cigarette?

A. That's one thing that will make it work, if you don't inhale you will not get lung cancer.

Q. The 1989 Surgeon General's report was entitled Twenty-Five Years of Progress, was it not?

A. Yes.

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Q. No where in that report or any Surgeon General's report does the Surgeon General suggest

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returning to the cigarettes from the beginning of the century?

A. There are, I believe, references in those reports, I can't remember precisely, to increase the pH of the cigarette to the point where you can't inhale it. It would make it uninhalable. I believe there are references about increasing the pH.

Q. To the point in which it's uninhalable?

A. Yes, but I can't remember that but we all know if you increase the pH to a certain point you can't inhale it, and if you can't inhale it you will not get chemicals in your lungs. And if you don't get the chemicals in your lungs you will not get lung cancer.

Q. And the total high pH is which you can't inhale is called a cigar, isn't that true?

A. Not necessarily.

Q. A cigar has a pH of about eight but the shape is different.

Can you make a cigarette that has a pH the same as a cigar?

A. That you can't inhale, it's been done.

Q. And it goes without saying if you don't inhale it you won't develop lung cancer?

A. If you don't get the chemicals in your lung

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you will have a very low risk from lung cancer.

Q. Apart from the uninhalable cigarette one of your other suggestions yesterday was to take out nitrosamines by the process used was King Sano?

A. Correct.

Q. King Sano was a commercial failure, wasn't it?

A. Yes.

Q. It removed some nicotine?

A. Removed most of the nicotine.

Q. The technology at the time was not used to remove nitrosamines, was it?

A. No. It had the affect of removing nitrosamines even though it wasn't used for that purpose.

Q. And it wasn't used for that because no one had discovered nitrosamines in the 1950's in cigarette smoke?

A. Discovered or measured in cigarette smoke I think it's the late '50's.

Q. Yesterday we saw some document dated 1964 with suspicion if nitrosamines so whether it could be used or not it was not used at that time to extract nitrosamine cigarette smoke?

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A. No. We're having a semantic difficulty if it did it or if doesn't then it did. Can't say that it didn't do it just because they didn't know they were doing.

I was questioned about the technology. The technology existed whether people knew what they were doing with the technology is a different question.

Q. And the resulting product was not consumer acceptable, was it?

A. And I testified because it didn't have

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nicotine in it.
Q. King Sano was a commercial failure, was it?
A. That's correct.
Q. Another possibility you suggested yesterday were charcoal filters, is that correct?
A. Yes.
Q. There having been charcoal filters on the market in the United States since the 1950's, isn't that true?
A. That's true.
Q. Tarryton was charcoal in the fifties --
A. Yes.
Q. Lark?
A. Yes.

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Q. And Reynolds had a brand named Tempo that was charcoal filter, correct?
A. That's correct.
Q. It was on the market from about 1964 to about 1980?
A. Yes.
Q. And it was a commercial failure too, wasn't it?
A. You're saying that one brand?
Q. That one brand.
A. That one brand was a commercial failure.
Q. In the United States charcoal brand accounts for one percent of the market?
A. They account for one percent of the market, yes.
Q. Answer my question, one percent of the market in the United States show the state the charcoal filters are failure?.
A. No.
THE COURT: In what sense? In the sense of selling the product?
MR. KACZYNSKI: Selling the one percent of the market is not a commercial success.
A. I don't understand the question. If you use

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a charcoal filter and you reduce the bad guys we were talking about and you tell people the bad guys are used they're the only reason it's a commercial failure is because it's different than the other products.
Q. And consumers don't like the taste of charcoal filters?
A. That's not true.
Q. And your basis for that is?
A. There are a whole group of consumers and other places of the world that smoke it. You have consumers that have not been taught by the industry to enjoy charcoal filter. It's an acquired taste, smoking. You don't grow up liking to smoke or wanting to smoke. It's an acquired taste.
Q. Can you acquire the taste of a charcoal filter or not exactly.
(Whereupon, Robin Bates was relieved by Michael Issacoff.)

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Doctor Farone - Plaintiff - Cross/Kazcynski
Q We talked about additives.
It's true, isn't it, that every year since the 19 -- mid 1980, 1985, 1986, the tobacco industry has been required to submit to the Department of Health and Human Service a list of its additives?
That's true, isn't it?
A The requirement is true, yes.
Q And the Department of Health and Human Services further is required to report to Congress from that list if there are any potential health problems associated in the additive list?
That's true, isn't it?
A Yes.
Q And they've never so reported to Congress, that's true, isn't it?
A They are in the process of doing that evaluation.
The papers are being published that have identified at least six or seven problems, and I think that report will be forthcoming.
The time lag is tremendous.
Q The answer to my question is --
THE COURT: Not yet.
Q To date?

Doctor Farone - Plaintiff - Cross/Kazcynski
The answer to my question is, no; right?
THE COURT: No, not yet.
A Not yet.
They are doing the work.
Q I don't have any other questions, Your Honor.
MR. SHEFFLER: If it please the Court.

CROSS-EXAMINATION
BY MR. SHEFFLER:

Q Doctor Farone, how are you?
THE COURT: Wait a minute.
Are we up to you?
Oh, I wouldn't take this away from you for the world.
Go ahead.
MR. SHEFFLER: Thank you.
Q Doctor Farone, we haven't met.
My name is Bruce Sheffler. I represent the Brown and Williamson Tobacco Corporation in this case, and what's left of American Tobacco Company which was acquired by Williamson.
I'm going to be very brief. I only have a few questions.

Doctor Farone - Plaintiff - Cross/Sheffler
Because of the claims against my claim, all I'm going to ask you about, Doctor, is what was known in the general scientific community about some of the issues you talked about prior to 1969; okay?
A Okay.
Q And Doctor, I'm going to start by asking

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you a little bit about some testimony you gave yesterday about the ingredients in tobacco smoke.
You recall that?
You said there were a number of compounds that were found in to in tobacco smoke.
I think you said by 1969 they had identified 2,000 compounds in a particular phase of tobacco smoke.
Do you recall that?
A I think they said they anticipated 2,000. I think they might have said they actually had identified 800.
Q 800.
They there might be 2,000 but they only isolated and identified about 800?
A I think that's, you know, recollection of time scale, yes.
Q And that was 1969.

If we go back to 1953, 1953, Doctor would it be fair to say that there were less than 200 compounds that had been identified in tobacco smoke?
Would you agree with that?
A I agree something on that order, I could agree with that.
Q You mentioned yesterday there were certain things that they used to try to find these compounds, and a lot of these particulates were being used by employees of tobacco companies like yourself?
A That's correct.
Q Chemists, and they were publishing how to use certain techniques to identify compounds in tobacco smoke; correct?
A That's correct.
Q And from your review of the documents that you did, you know in fact they published what the compounds were that they found in tobacco smoke; correct?
A Who's they?
I am not sure.
Q The people that were researching in the various tobacco company like the American Tobacco

Company?
A They, being researchers generally in the field, not meaning to imply that all the compound these people found were being published, just when there were publications appearing that showed compounds being found in tobacco smoke?
Q And you read those publication in your general review of the literature?
A Best I could.
Q You know they used certain techniques.
You identified infrared spectometry, I think, was one of the things you said were identified?
A To identify, not separate. To identify.
Q Identify?

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A Right.
Q And you also mentioned, I think, mass spectometry?
A That's correct.
Q Gas chromatography you mentioned?
A Correct.
Q In 1953, Doctor, were those techniques all available and being used?
A Infrared was being used in that time frame.

Q How about mass spectometry?
A Mass spectometry was brand new. I think that was an offshoot of World War two.
Infrared was available.
Column chromatography was available.
Q Gas chromatography, we will get to in a second, but let me ask you about other techniques used in the '50's, especially '53?
THE COURT: How about one at a time, counsel?
Q Can you identify for us other techniques used in 1953 to identify compounds in tobacco smoke?
A I believe I can't.
Q Would you?
A Relatively complicated because when I took my chemistry, started in 1957 when I went to college.
In addition to visual, in addition to things like visible spectrum, and you have spectrum, and I have spectrum.
We had a complicated procedure of taking the chemicals and you put them through various solvents, and divide them up by class, okay?
Then you would take those classes and what

you do, you would make a derivative, make another chemical out of it, and that derivative chemical was specific, it would have a specific melting point that you could determine.
So, in my early days of chemistry where we didn't have some of the equipment, all this was done manually, which is wet chemistry.
Q Wet chemistry.
I want to show you a picture of some scientists isolating some compounds from tobacco smoke and see if you can identify the technique that was being used.
This was from a Life Magazine article in 1953.
Let me put this up.
MR. FINZ: Excuse me, please.
Before we show that, Your Honor, may we have a discussion with Mr. Sheffler for a moment?
Mr. Sheffler, may we have a discussion?
THE COURT: Well, it's on the -- on the -- want to come up here, have a good time.
Q If we could show this. See if I can.
Can you see that, Doctor?

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Doctor Farone - Plaintiff - Cross/Sheffler

A Yes, I can.
Q Okay.
Now, there is -- this is, again, this is from the Life Magazine article, 1953, and it was a title of the article was; Smoke Gets in the News.
It was actually reporting the Wynder and Graham study.
Familiar with that study?
A Yes.
Q That was the mouse skin painting study?
A One of the early ones, yes.
Q It was reported in this December '53 magazine but then there is another picture in this article and it shows a chemist there, the chemist at the American Tobacco Company?
A Yes.
Q And he's isolating ingredients of the cigarette smoke, is that right?
A What it says.
Q Can you tell what -- is that wet chemistry, what he's doing, what he's using there?
A I think it's a little bit of a made up picture but basically wet chemistry means he is using flasks and containers and glassware rather

Doctor Farone - Plaintiff - Cross/Sheffler

than have instruments to do it.
Q This was the type of thing that the chemists at the American Tobacco Company and other companies were doing to isolate the ingredients in cigarette smoke and publish them; is that right?
A That's what the type of thing they were doing.
Q So, this was no secret that they were doing this kind of work in 1953, was it?
A That's correct.
THE COURT: No secret from who?
MR. SHEFFLER: From anyone, Your Honor.
THE COURT: Counsel, come on.
Q Now, you mentioned gas chromatography. Gas chromatography was not used in 1957?
A Column chromatography was used in '57.
Q Not gas?
A Correct.
Q In fact, the first time gas chromatography was used was after 1959, for tobacco smoke; wasn't it?
A First published article I think appeared late '50's early 60's. ?

Doctor Farone - Plaintiff - Cross/Sheffler

Q I'm talking about the one by Erby and Harlow, Department of Research and Development of the American Tobacco Company published in 5tobacco Science in 1959.
Are you familiar with that?
A I don't recall it.

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Q Can I show it to you?
A Sure.
(Handing.)
MR. SHEFFLER: For the record, this is Defendant's Exhibit A 5440.
Q Have you seen that before?
A Yes, I believe I have.
Q Doctor, isn't it true that this was the first publication talking about how to use gas chromatography to identify cigarette compounds, cigarette smoke compounds; right?
A I'm not sure that it was that that was the case.
Q Well, if we could put --
MR. FINZ: Excuse me, Your Honor.
If Your Honor please.
Excuse me.
I don't think this is in evidence.

MR. SHEFFLER: It's is A 5440.
There's been no objection.
MR. FINZ: I object to it.
I'm advised that there has been an objection at the earlier session.
MR. SHEFFLER: There was no objection for this.
MR. LONDON: May we approach, Judge?
THE COURT: Please approach.
(Whereupon, a discussion was had off the record.)
(Whereupon, the following takes place on the record, in open court.)
Q Doctor, was the development of the gas chromatography apparatus for cigarette smoke, was that something that you reviewed in this article?
A I have seen the article before but I don't think I reviewed it for its analytical content.
Q You know that the American Tobacco Company did develop that methodology, correct?
A I've trouble with that because I think it was developed by other people previous to that.
What I think you are asking me, and maybe I got the question wrong, is whether the American

Tobacco Company was one of the first tobacco companies to use it for that purpose; is that what you are asking?
Q I am not asking you that at all.
I'm asking, was gas chromatography, the development of the apparatus of gas chromatography for reviewing complex mixtures, very important mixtures, aerosol mixtures like tobacco smoke, was that first published by American Tobacco Company researchers in 1959?
A No.
Q When it was first published, there were references that go back to '56 or '57, where gas chromatography was used for collection issues of tobacco smoke.

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A That's --
THE COURT: No, that's --
A That's not the question you asked me.
Q Was it used for tobacco smoke in --
A Not articles that I recall.
Q Do you recall an article before 1956 at that the American tobacco smoke published that used gas chromatography for tobacco smoke?
A No, I don't.

Q Doctor, in your testimony yesterday you were shown an Exhibit, 701, and you were asked questions about that, and I want to go over one paragraph of this if I could.
It was -- I want to show it to you. You need a copy?
MR. FINZ: You have one for me, I appreciate it.
MR. SHEFFLER: Okay.
MR. FINZ: We have it over here.
Excuse me.
MR. SHEFFLER: You have it?
Q I would like to give the Doctor a copy.
(Handing.)
MR. FINZ: Thank you.
Q Now, there was a page in this document, 701, that was entitled; Some Possible Ways to Reduce Carcinogens in Tobacco Smoke.
You see that?
A That's correct.
Q You testified about this yesterday?
A Yes, I did.
Q And one of the things of the possible ways to reduce carcinogens in tobacco smokes, one of the

things you said about this was something that should have been done prior though 1969, these methods; right?
A Correct.
Q And one of the methods that you said should have been done and was not done prior to 1961, was discover differences in particulate fraction which will permit separation of carcinogens and smoke; is that correct?
A That's correct.
Q Let's break this down, if we can.
Discover differences in particulate fraction.
That refers to the particulate matter in smoke, the tar, right?
A I think I testified that part of it had been done, that the discovery of the fraction -- we can go back and read my testimony. It might be helpful.
Q I will, if you want me to.
A I am just trying to remember what I said because I'm quite sure that I differentiated between the two parts of this.
Q Yes, you did.

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Doctor Farone - Plaintiff - Cross/Sheffler

You said; the discovery of the carcinogens was done, but as of 1961, I do not know of any techniques for separation that were applied.

That's what you testified to, right?

A Correct.

Q And so, what you are saying, Doctor, that there were no fractionalization or splitting the tar into different fractions prior to 1961?

A That's not -- I think I gave an example.

If you read -- you can't.

If you find out that there is a fraction in the particle, how did you get it out of the particle without damaging the particle?

That's what I am referring to.

Q What I'm asking you is simply this.

Did they or did they not, back in 1953, attempt to split tar into fractions to identify the cancer causing agents that was causing those skin cancers in mice?

A Yes, and that's what I said.

Q They did?

A Yes.

Thick fractionate it.

You can discover the difference in the

Doctor Farone - Plaintiff - Cross/Sheffler

fraction but you can't separate the carcinogens such that you could make a safer produce very simply by knowing they are in the factions.

Q In fact, Doctor, if that same article that we showed before, I want to direct your attention to the bottom page, the bottom picture.

You see where there is somebody standing before a complex series of flasks and jars and whathaveyou? You see that?

A Yes, I do.

Q Splitting tar into fractions in search for cancer causing agent.

That's what we have been talking about, right?

A That's correct.

Q 1953, is done at New York University.

You know where New York University is?

A Certainly do.

Q Okay.

Partly supported by the Runyon fund.

You see that?

A I do.

Q Do you know what the Runyon found was in 1953?

Doctor Farone - Plaintiff - Cross/Sheffler

A I don't remember.

I was 13 at the time.

Q Well, maybe in your review of all these documents from the time period you came across the Runyon fund, which was sponsoring research into lung cancer; are you aware of that?

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A No, I don't recall.
Q You don't recall that.
You don't recall reading the American Tobacco Company was the largest sponsor of the Damian Runyon fund in 1953?
MR. FINZ: Objection, Judge.
Excuse me.
Objection.
THE COURT: Sustained.
Q You don't recall reviewing the funding sources, where the funding opportunities that the American Tobacco Company undertook in 1953 on the issue of splitting tar to identify cancer causing agents?
A The name of the fund was the one thing I didn't recover -- remember until you said; Damian Runyon, and that range a bell.
Q You know the Damian Runyon fund?

A Just Runyon alone didn't ring a bell.
Q Damian Runyon fund did fund research on lung cancer, didn't it?
A Yes and -- absolutely.
Q And you do recall, now, that one of the major sponsors of that fund was the American Tobacco Company; correct?
A Yes.
Q Now Doctor, that was back in 1953; was it not?
A That certainly was.
Q I want to go on to some of the other things in that exhibit that you talked about yesterday.
There were a number of things you said it could be used to reduce carcinogens, according to that exhibit, that hadn't been done.
You referred to tobacco extracting, is that correct, extracting materials from tobacco?
A I'm sorry but I don't think I said it could not be done.
Q I am sorry, it wasn't done. You said it wasn't done, is that right?
A No, I think --
Q Maybe I misunderstood your testimony.

Doctor, you listed a number of things in that document, 701, and you said that these things, as I understand it, should have been done but were not done; is that right?
A They should have been done and resulted in safer products.
Q But they were not done?
A They were not done.
Q Prior to --
A No.
I gave examples of one that was done.
Extraction was done in --
Q Okay?
A Obviously was done but there are no products that are extracted, no products in 61, '63,

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'66.
Q My question is different.
My question is really different because now I am really confused about what your testimony is.
THE COURT: We don't need --
MR. FINZ: Excuse me.
THE COURT: I don't really want you to tell the witness that or the jury, because we know better.

MR. SHEFFLER: I'm sorry.
Q Now Doctor Farone, is it true or is it not true that there -- the reduction in carcinogens that are listed on that page were investigated prior to 1969?
MR. FINZ: What page?
MR. SHEFFLER: 701, page two.
MR. FINZ: Excuse me, what page was that, Your Honor?
MR. SHEFFLER: The one you showed him yesterday.
A Could you ask that question again because I could answer, yes, and you wouldn't know what I meant.
Q Were these possible ways to reduce carcinogens in tobacco smoke investigated, investigated, for research?
A Yes.
Q Prior to 1969?
A Yes.
Q They were?
A They were investigated for research.
Q Okay.
And among those who investigated them,

Doctor, was Ernst Wynder?
A Correct.
Q And Dietrich Hoffman?
A Yes.
Q And Ernst Wynder and Dietrich Hoffman were two very, very important researchers in the 1960's and tobacco and smoke and its effect; would you agree?
Would you agree that Ernst Wynder and Dietrich Hoffman both published extensively on their research on tobacco smoke and its effect?
Would you agree?
A Yes.
Q You would you agree, Doctor, that you reviewed some of this information by these two research giants in the 1950s and 60's?
A I reviewed virtually all of their paper.
THE COURT: Is this what you call a few questions?
MR. SHEFFLER: I thought it was a few.
THE COURT: You are right.
I knew better, of course.
Q You read, did you not, the National Cancer Institute's Monograph 5number 28, published in

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Support https://www.industrydocuments.ucsf.edu/docs/njxd0001

June, 1968, entitled; Toward a Less Harmful Cigarette?
You read that, haven't you?
A Yes, I have.
Q You know that the National Cancer Institute is part of the U.S. Department of Health Education and Welfare; right?
A Yes.
Q And you know, as well, it's part of the public health service?
A That crest --
Q And the National Cancer Institute had a conference in or about or before June of 1968 that was really the predecessor for this book?
A I think that's part of the proceedings of the conference.
Q It's the proceedings of the conference and the conference chairman, Ernst Wynder and Dietrich Hoffman; correct?
Let me just --
(Handing.)
Q Is that correct?
A That's what it says.
Q Okay.

So, the conference toward a less harmful cigarette chaired by Dietrich Hoffman and Ernst Wynder was published in June, 1968, and I want to show you an article from that, that you have read; okay?
A Okay.
Q And in this, Doctor, I would like to show you an article by Dietrich Hoffman and Ernst Wynder that was entitled; reduction of tumorigenicity of tobacco smoke.
Tumorigenicity means what?
A Causation of tumors.
Q Causation of tumors means causation of cancer, doesn't it?
A Yes.
Q I want to go to the summary, if I may?
THE COURT: I take it, is this in evidence?
MR. SHEFFLER: No, it's not.
MR. FINZ: I am going to object to it.
MR. SHEFFLER: I am using it as an authoritative treatise.
THE COURT: Is this an authoritative treatise, do you find?

THE WITNESS: The problem is, it's so old.
At the time it was authoritative.
THE COURT: I will allow it.
Go ahead.
Q That's what we are talking about.

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I'm not talking about anything after 1969.
All I want to do is focus on the time period of what was known in the general scientific community, of the time period before 1969. That's all I'm asking about.
A Okay.
Q In that time period, Doctor, would you not agree that it was written by Doctor Wynder and Hoffman that tobacco smoke contains at least two types of carcinogenic agents, tumor initiators and tumor promotors, the polynuclear aromatic hydrocarbons, PAH, that's what you told us about?
A Correct.
Q Was identified as the only group of tumor initiators in tobacco smoke.
Now, so far you agree this was a fair reflection of the general scientific understanding about tobacco smoke in 1968?

A No.
Q Let's go on and see if you disagree further with Doctor Wynder and Doctor Hoffman and the--
MR. FINZ: I object to that remark by Mr. Sheffler, Your Honor.
THE COURT: Sustained.
Q Several methods that appear theoretically feasible for the reduction of PAH's include breeding of specific tobacco strains.
You mentioned that yesterday, didn't you?
A I did.
Q Modification of the combustion temperature, surface of tobacco, which we've talked about a bit, changing of cigarette paper, addition of alkali nitrites or selection of tobaccoes rich in alkali nitrites, and the manufacture of reconstituted tobacco sheets.
That's what Doctor Wynder and Hoffman were saying could have been done, several methods --
THE COURT: What is their background?
MR. SHEFFLER: Let's talk about their background.
THE COURT: What were their scientific backgrounds?

THE WITNESS: They didn't work for the tobacco companies, and my problem is --
THE COURT: What do you mean?
THE WITNESS: They didn't work for tobacco companies and they were independent and we just heard that American Tobacco Company, heard about the carcinogens in 1957, and now we fast forward it to 1968.
MR. SHEFFLER: I move to strike it because I don't think there is any foundation for that testimony.
THE COURT: Overruled.
Q Do you have a document that shows the American Tobacco Company --
THE COURT: I have asked you a

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question about, aren't they epidemiologists, Wynder and--

MR. SHEFFLER: No.

Wynder may be a epidemiologist in part when he was alive and practicing.

Q Doctor, what was Doctor Hoffman's expertise?

It was the same as yours?

A No.

Q Was not Doctor Hoffman a physical chemist?

A Yeah, physical chemist.

Q Are you not a physical chemist?

A That's true.

Q Is not Doctor Hoffman's's expertise the same as yours?

A In that sense, I will buy it.

Q Doctor Wynder was a biologist, a researcher in biology; was he not?

A Yes.

Q He also was a researcher in chemistry, organic chemistry?

A Yes.

He was a researcher but I don't know if he was an organic chemist.

Q You would agree, these two gentlemen are experts in the field of tobacco and tobacco --

A I just said they said they were authoritative in their field.

Q Okay.

Their field being physical chemistry, organic chemistry, biology and epidemiology?

A Their field is epidemiology.

Q Doctor Hoffman ever produce an epidemiology

study?

A Yes, the 95 percent, what he talks about the types of cancer due to nitrosamines.

Q Let me just finish this off, then.

They mentioned these feasible, theoretically feasible reduction methods and then they say, at the end; so far, only the last two methods have brought encouraging results.

That's as of 1968, correct?

Is that their opinion?

A That is their opinion, two men outside the industry, didn't work for any tobacco company, did not have the expertise and the information going back to the 50's that the tobacco companies had.

Q Doctor, did they know what they were talking about when she had these were feasible alternates; did they know what they were talking about?

A When they said they were feasible alternates, yes, they knew what they were talking about.

Q Did they stress those alternates?

A No.

Q Did you read this, Doctor?

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A Yes.
Q Did they not investigate extraction methods?
Did they not investigate how we can find with increasing nitrite content of tobacco that selective significant reduction in pH?
Did they not do that?
A They did that.
Q Did they not talk about how they use different tobacco strains, Doctor?
Did they not stress --
A They did not mention, in any article that I have ever seen, a single brand of cigarette that was sold on the market by any company.
Q Did you know that Doctor Dietrich Hoffman used Pall Mall unfiltered cigarettes for testing cigarettes?
A Did he publish that result?
Q Yes.
A No.
Q Did you know that?
A Pall Mall is listed in his papers?
Q No, it's not listed in his paper.
He says a popular U.S. cigarette?

A That doesn't --
Q Did you ask him?
A I have asked since the late 70's, you know, and before that time to find out all of these people who publish articles where they say, as Reynolds has done as everybody had done, and say commercial cigarette.
That doesn't tell you anything.
Q Did you ask Doctor Hoffman whether or not he used the Pall Mall cigarette for his test?
A I asked Doctor Hoffman's which cigarettes were used in the American Held Foundation Reports published in the late 70's.
Q And?
A No answer.
Q He wouldn't tell you?
A No.
Q So, when he says he used a commercially available popular U.S. cigarette, you don't believe him?
A I believe him.
I wanted to know which one it is.
If you want to know if it is doing any good, I need to know the construction of the cigarette.

I don't -- it's not very helpful in determining cancer risk or whether or not that cigarette -- there is 57 things you can change.
If you don't know what the cigarette is and you don't know what the composition was, as he did not know, then how does he know whether the changes

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that we are talking about, have been made or not.
Q Well, what he said, what he said was not 57 different things that could be done and what would happen.
What he said was, what was theoretically feasible and what methods at 1968 showed encouraging results.
That's what he said, isn't it?
A That's not the way I interpret what he said.
Q I am not asking your interpretation.
MR. FINZ: Excuse me, Judge, that's exactly -- excuse me, Judge.
I will object to that.
MR. SHEFFLER: Can I finish my question?
MR. FINZ: There was --
THE COURT: If you stop arguing with the witness, you might.
Michael D. Isaacoff, OCR
2838
Doctor Farone - Plaintiff - Cross/Sheffler
Q Simply Doctor, just, if you would read with me the last line highlighted.
So far, only the last two methods have brought encouraging results.
Did I read that correctly?
A You read it correctly.
Q And Doctor, if the last two methods referred to was the addition of alkali nitrites in the manufacture of reconstituted tobacco sheets --
A I have a great problem in understanding the question.
Am I to understand those two methods were tried in Pall Mall.
Q Pardon me?
A They were tried in Pall Mall. These two methods were used --
Q I am simply asking you what the document says?
A Okay.
Q Does the document refer to tobacco rich in alkali nitrites or the addition of alkali nitrites and the addition of reconstituted sheets?
These are the only two methods they thought brought encouraging results?
Michael D. Isaacoff, OCR
2839
Doctor Farone - Plaintiff - Cross/Sheffler
A How can you determine whether that's correct or not without knowing what products they were tried in?
Q I'm not asking you if they were correct. I am asking you whether this was believed?
MR. FINZ: Objection.
THE COURT: I'll allow it.
A It's what they stated.
Q Thank you.
Now Doctor, I want to turn to this nitrosamine document that you were showed yesterday.
It's Exhibit 30.
(Handing.)
Q First of all, Doctor, you were shown this yesterday and you were read a sentence from it.

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I want to clear up one thing at the very top.
You see where it says who this document is from?
A Well, better at the bottom because his name is on the --
Q What institution is he with? Was he with the Tobacco Institute?
A He was with the Tobacco Research Institute.

Q Okay.
And the Tobacco Research -- Doctor, first of all, there some Dutch language up there.
Can you read Dutch?
A With a little bit of help.
Q Can you read that?
A Well, which one?
This that's written above Tobacco Research Institute is the word for research institute for tobacco in Dutch.
Q This was a Tobacco Research Institute in South Africa, wasn't it?
A That's correct.
Q And the document was written by somebody who was at the chief of the Tobacco Research Institute in South Africa, is that right?
A Yes.
Q Okay.
What he did was, he sent this letter in which he talks about -- let me first of all, let's just read what was read to you yesterday.
He informed me that he had qualitatively identified nitrosamines in tobacco smoke beyond any doubt but makes no claims as to their carcinogenic

action in tobacco smoke.
See that?
A Yes.
Q Then it goes to say, although the press reports went much further.
Who is the, he, being referred to in that sentence?
A The, he, being referred to is, if you read the rest of the article, appears to be W.J. --
Q Serfontein?
A I can't say what that first --
Q Its an "S"?
A Something like that.
Q Serfontein?
A I think so.
Q Okay.
In any event, Serfontein was not with the Tobacco Research Institute was he, in South Africa?
A No, he was not.
Q Do you know who this guy was, Serfontein? Have you ever read anything he wrote?
A I don't recall.
Q Okay.
According to this, he, again, Serfontein has

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not published his results and told me, the author of the letter, that he does not intend doing so in the near future.
Right?
A Yes.
Q Now, there was a response to this letter, did you know that?
A No, don't have it.
I may have seen it at some point.
Q You may have seen it at some point.
You saw this letter at some point in the past, not before this trial but some point in the past?
A You know, I see so many documents. I think I have seen this before.
If this was submitted either in, some of the other cases, than I have a high probability of having seen it.
Q Well, then you probably have had a high probability of seeing this letter that was in response to it.
You can see this --
MR. FINZ: This is not in evidence.
Q -- is doctor J.W. Marae?

MR. FINZ: We haven't seen it.
It's not in evidence.
MR. SHEFFLER: It's not in evidence but I am going to move it in evidence.
MR. LONDON: What number.
MR. SHEFFLER: 7349.
THE COURT: Not listed.
MR. SHEFFLER: No.
It's impeachment.
Q Now, you can see, Doctor, that it is to --
THE COURT: No. Off.
Q The letter is to doctor J.W. Marae?
THE COURT: Counsel, before you refer to the contents of the letter, you establish a predicate for its introduction.
MR. SHEFFLER: That's what I was trying to do.
THE COURT: Well, I don't think that was the way to do it.
Q You are familiar that there was a response to the letter that was shown to you yesterday and marked as Exhibit 30, the letter to Mr. Mosely from the Tobacco Research Institute in South Africa.
You are familiar there was a response to

that?
A I'm not sure.
I think I have seen this correspondence before but I'm not sure.
Q And the date of the correspondence that was sent from South Africa was 29, October, '64 to

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Morae to Mosley?
A Correct.
Q The letter you hold in your hand is dated November 25, a month later; correct?
A I don't have a copy of it.
MR. SHEFFLER: May I have that back?
MR. FINZ: Sure.
(Handing.)
MR. SHEFFLER: There you go.
(Handing.)
Q A month later, right?
MR. FINZ: Excuse me, Bruce, do you have an extra copy for us?
You don't --
MR. SHEFFLER: I will -- you want to look over my shoulder?
MR. FINZ: No. No. I trust you.
Q November 25, a month later; correct?

A That's correct.
Q And its to the same person who wrote the letter to Mr. Mosley, Marae?
THE COURT: What is Marae, again.
MR. SHEFFLER: With the Tobacco Research Institute of South Africa who wrote exhibit 30 to Mr. Mosley.
THE COURT: Mr. Mosley.
MR. SHEFFLER: American Tobacco Company, and he responded.
Q He responded, did he not?
A Yes, he did.
Q So, what you have in your hand is the letter in response to --
THE COURT: Come on up here, folks.
(Whereupon, a discussion was had off the record.)
MR. SHEFFLER: We are offering A 3749.
THE COURT: As to the first paragraph.
MR. SHEFFLER: As to the first paragraph.
THE COURT: All right.
Consent.
COURT CLERK: This is received into evidence on consent.

THE COURT: Not the whole thing.
First paragraph.
COURT CLERK: A 3749.
Q Now, in Mr. Mosley's response to Mr. Marae he writes; we have your letter of October 29, 1964 and greatly appreciate the information on the nitrosamine question.
From your letter, it would seem unlikely that Serfontein has established the presence of nitrosamines in cigarette smoke.
If you publish your cigarettes or have further information on the subject, we appreciate being advised.
Did you say that before?

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A Yes, and it's obviously -- he didn't even try to reproduce the results.

He doesn't say which method he tried, outlined in the letter of 29 October 1964, and it didn't work.

It's a knee jerk response to this without any effort to try.

Q When was Serfontein's results published?

A They are in the letter they received their

in the 29th.

Q When were the results published?

He has not publish his results and told me that it's not intent to do so in the near future when they were published.

A They were published when the letter was sent.

THE COURT: Aside from that, do you have any indication that they were ever published?

THE WITNESS: In the scientific literature, I don't have any indication.

Q They were published in 1966 does, that ring a bill? Does that refresh your recollection?

A I don't recall.

Q Do you know what Doctor Wynder and Hoffman said about the Serfontein studies?

THE COURT: Sustained.

Q Is not Doctor Wynder and Hoffman experts in -- experts in the filed of physical chemistry?

THE COURT: Sustained.

Not interested.

We are going to keep this under control.

I don't care. It's not relevant.

Q What were the two nitrosamines?

THE COURT: Members of the jury, that came in on the issue of notice to American Tobacco to the extent it is relevant.

I don't care what anyone else said.

It's what they did about that or didn't do that's the issue, not what some other authority said about it.

Let's go on.

Q Doctor, do you know, from your review of the American Tobacco Company's research whether there were research reports in their fields that criticized the Serfontein methodology?

Do you know that?

A Don't recall.

Q Do you know, Doctor, whether there was a book in the American Tobacco Company's library that says Doctor Serfontein's's results?

MR. FINZ: Excuse me, Judge, before anything is read, I'm going to object to it.

THE COURT: Sustained.

Q Do you know if there was a book in the American Tobacco Company's library that listed

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Doctor Farone - Plaintiff - Cross/Sheffler

Serfontein's results and said they could not be duplicated?

THE COURT: Sustained.

Q Do you know what the three nitrosamines that Serfontein claimed to have found? Do you know what they were?

Do he identify them in this paper?

A No, it doesn't.

Q You don't even know -- how many nitrosamines are there, Doctor?

How many nitrosamines are there that have been identified in cigarette smoke?

A I don't remember the number by it's quite a few.

Q Quite a few.

This letter, which you claim sets forth the information about the study doesn't even identify which three nitrosamines they were talking about, does it?

A The object of this letter was to identify the existence of nitrosamines, not to specifically say -- it says qualitatively identified nitrosamines in tobacco smoke, qualitatively.

Q He claimed to.

Doctor Farone - Plaintiff - Cross/Sheffler

A Nine.

Q He claimed to.

You don't know which three of any of those out of the many that are in cigarette smoke he claimed to have identified?

A Doesn't matter.

They are all carcinogenic.

Q They are all carcinogenic?

A Nitrosamines --

Q The lung?

Are you familiar with the 1981 surgeon general's report?

A I am very familiar with it.

Q Do you know the 1981 surgeon general's report says; at present, there is no reason to assume that volatile nitrosamines cause lung cancer in smoker's?

Did you know that?

A Yes.

Q Do you know that the three nitrosamines he found were volatile nitrosamines?

A The three -- using this method, am I to understand, are you asking me to say he only found three volatile nitrosamines?

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Q That's right.

A I don't agree.

Q This is the study that Serfontein eventually published?

MR. SHEFFLER: May I approach?

THE COURT: Counsel, I object to your

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comment to the jury, this is the study he eventually published, and that's sustained and stricken.

Q Doctor, do you see an article published by Serfontein in cancer research, in 1966?

A I see a paper, copy of a paper.

Q Do you see the title is; The Nitrosamine as Environmental Carcinogens?

A Yes.

Q You see evidence for the presence of --

A Yes.

Q And do you see --

THE COURT: Counsel, counsel, we are not doing this, this way.

Q Is this study, Doctor, that Serfontein was referred -- referred to in that letter?

A I don't know.

Q Do I take it that you don't know anything

about the Serfontein study?

MR. FINZ: Objection, Judge.

I think --

A No.

MR. SHEFFLER: No further questions.

MR. QUIGLEY: Your Honor I have quite a bit.

May we approach?

(Whereupon, a discussion was had off the record.)

(Whereupon, Michael D. Isaacoff, Senior Court Reporter, is relieved by Judith Brusca, Senior Court Reporter.)

(Judith Brusca replaced Michael Isaacoff as Court Reporter.)

(The jury leaves the courtroom.)

(A short recess was taken.)

(The witness resumes the witness stand.)

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(The jury enters the courtroom.)

MR. QUIGLEY: May I, your Honor?

Good afternoon.

THE COURT: I want to check to see if the witness was here on the stand.

CROSS-EXAMINATION

BY MR. QUIGLEY:

Q Good afternoon Doctor Farone. Good evening maybe I should say.

A Good evening.

Q My name is Tom Quigley and I represent your former employer Philip Morris.

THE COURT: I'm trying to balance plane schedules. Please understand I'm doing the best I can under difficult circumstances.

Go ahead.

Q Doctor, I just want to start by talking a little bit about your background.

I think you told us that you are a physical

chemist by education and by profession; is that right?

A That's correct.

Q You are not a medical doctor; are you?

A No, I'm not.

Q You don't hold yourself out to be an expert in oncology; do you?

A I do not.

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Q You don't hold yourself out to be an expert in pulmonology; do you?

A No.

Q You don't hold yourself out to be an expert in pathology; do you?

MR. FINZ: I'm going to object to this.

THE COURT: Overruled.

A Not --

Q You don't hold yourself out to be an expert in epidemiology?

A Pathology? I don't know what you mean by expert.

Q You don't have any advanced degrees in pathology?

A No.

Q You've never practiced pathology in the sense of making diagnosis the way a doctor would? You don't do that?

A No. At this time all with regards to the test we

run at Lieberman.

Q You don't hold yourself out to be an expert in epidemiology; do you, Doctor?

A No.

Q You don't hold yourself out to be an expert in molecular biology?

A Yes.

Q Any advanced degrees in molecular biology?

A In physical chemistry we do molecular biology research all the time.

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Q There are Master's degrees awarded to molecular biologists?

A When I got my degree we didn't --

Q There are?

A Yes.

Q There are Ph.D. degrees specifically in molecular biology?

A Yes, there are now.

Q You don't have any one of those?

A They didn't exist when I got my Ph.D.

Q You don't belong to any professional societies of molecular biologists; do you?

A Professional societies in molecular biology. Microbiological division of the chemical division where we

are involved in molecular biology research.

Q Doctor, you don't hold yourself out to be an expert on addiction; do you?

A I have expertise in addiction.

Q You are not a pharmacologist; are you?

A I'm not a pharmacologist.

Q You're not a psychologist?

A No.

Q You're not --

THE COURT: A medical doctor.

Q You're not a medical doctor? You're also not a psychologist; are you?

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A I think I've answered those both.

THE COURT: You're not a person who is devoting a substantial portion of working life to the treatment and understanding of addiction?

THE WITNESS: That's correct.

THE COURT: I know how to ask questions too.

MR. QUIGLEY: Thank you.

Q You worked at Philip Morris for about eight years, 1976 to 1984; is that right?

A That's correct.

Q I think you told us when Mr. Finz was asking the questions that you spent that first year 1976 to 1977 doing

a lot of research about Philip Morris; is that what you told us?

A Not Philip Morris. All of the tobacco technology and operations that were used by Philip Morris; not Philip Morris per se.

Q You visited Philip Morris' manufacturing facilities during that year?

A I did.

Q You spent a lot of time in Philip Morris' library that year?

A I did.

Q You read a lot of articles and a lot of documents that year?

A Both external and internal documents, yes.

Q You talked to a lot of people within the company

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Philip Morris during that year; didn't you?

A Yes, I did.

Q I think you told us that your research went back in time to the 1930s; is that what you said?

A I said I found documents that went back to the thirties concerning some of the processes that Philip Morris was using and things that they were doing.

Q You did a pretty thorough investigation there; didn't you, Doctor?

A Best I could.

Q After that year you didn't decide that you didn't want to work for Philip Morris; did you?

A I did not.

Q After that first year you found there was some good hard-working decent people at Philip Morris; didn't you?

A Yes, there were.

Q And you found that there?

THE COURT: Especially his wife.

Q Especially his wife. Were you married at the time, Doctor?

A Yes, I was.

Q Was your wife working at Philip Morris at the time?

A No.

Q Did you get her the job?

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A No. I got divorced and married during the time I was in Philip Morris.

Q Anyway, Doctor, you found there was a lot of people doing worthwhile work when you were investigating Philip Morris that first year; is that right?

A Yes.

Q Now, after about a year you received a promotion;

is that correct?

A That's correct.

Q You were promoted to Director of Applied Research; is that the title?

A That's correct.

Q That was one of five directorates within the Research and Development Department of Philip Morris; is that accurate?

A No. First year I think it was four. Then there were five.

Q They added a fifth?

A Yes.

Q What were the five directorates at Philip Morris?

A The five, after they added the fifth, which is like a year or two after. Director of Applied Research, which was mine, Director of Administration, Mr. Thompson. Director of Product Development, Mr. Leo Myer (ph). Director of Process Development, Doctor Walt Gannon. And Director of, it had different names, basically Biological Research, Doctor Thomas Dee (ph).

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Q In 1977 you reported to the Vice President of Research and Development; is that correct?

A True.

Q Who was the Vice President of Research and

Development in 1977?

A Robert B. Seligman (ph).

Q When you started in your position as a Director of Applied Research there were about forty people in your group; is that right?

A Approximately.

Q Over the eight years that you spent with the company, that group alone grew to about two hundred people; is that right?

A Two hundred and fifty.

Q The Research and Development Department also grew as that group grew?

A Mr. Myers, Director of Development.

Q Entire Research and Development Department was under Seligman or his successor?

A Yes, it did.

Q How many people were in the Research and Development group when you took over as Director of Applied Research in 1977?

A Three hundred and fifty, something like that.

Q How many people were in the Research and Development group at the time you left in 1984?

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A Approximately six hundred.

Q So a large portion of that growth in the Research

and Development Department was in your group; is that right?

A No. It didn't work that way. We moved them all around. I got other people's groups.

I think the largest portion of the growth was in Process Development and Product Development.

Q You had a pretty sizeable group?

A I certainly did.

Q Doctor, your mission as the Director of Applied Research was to make a safer cigarette; is that correct?

A One of the missions.

Q Would you say that was the primary reason you were hired by Philip Morris was to develop a safer cigarette?

A That is my understanding.

Q I'm sorry?

A Yes.

Q And this was a goal of an objective that you believed in; is that fair to say?

A Yes.

Q And that you believed it was a worthwhile objective for Philip Morris as a company to have, that is to make a safe cigarette; is that right?

A That's correct.

Q Doctor, you were obviously paid by Philip Morris

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to pursue that objective of making a safe cigarette; is that true?

A That's true.

Q And Philip Morris provided you with the opportunity to do work that you thought was worthwhile and fulfilling in trying to develop a safe cigarette; is that accurate?

A Yes. They gave me the opportunity. They hired me, yes.

Q Not only you, but you had quite a number of scientists working underneath you, all devoted to trying to develop a safer cigarette; is that true?

A That is correct.

Q And, Doctor, you're proud of the work you did at Philip Morris; is that right?

A Well, we have to be careful.

I'm proud of the technology of the work. The problem is the safer cigarette never happened. Putting that aside --

MR. FINZ: What was that?

THE WITNESS: Safer never happened. The work we did I'm proud of.

Q You're proud of the work you put in to try to develop a safe cigarette?

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A Yes.

Q You even published some of the work you performed while you were working at Philip Morris; is that correct?

A That is correct.

Q You would be proud to talk about that work when you were talking to other people; isn't that true?

A We talked at universities, we gave papers, yes.

Q You were also proud of the work that the scientists who worked beneath you did while they were working at Philip Morris; is that drew?

A Yes, with the same recitation, yes.

Q You believed that the work you were doing while you were at Philip Morris was in the best interest of the consumers of Philip Morris products; is that true?

A Purpose of the work was to reduce disease and deaths from cigarettes, yes.

Q You believed that that purpose also furthered the interests of the medical community and the scientific community; isn't that right?

A Yes.

Q Doctor, at the time you left Philip Morris in 1984 you believed that the company was working on technology that ultimately would result in a safe product; is that fair to say?

A That was the hope, yes.

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Q And at the time you left the company in 1984 you believed the company was doing good things that would, I think you hoped, yield benefits to the consumers of Philip Morris products?

A Yes. And influence the entire industry to have safer products. That was my desire and goal.

Q You didn't leave the company because you were unhappy?

You didn't leave the company because you were unhappy that Philip Morris was not doing enough to make a safe cigarette; did you?

A Well, that is not the reason that I left, but I was concerned about doing more because in the eight years I was there, it's a matter of production.

Q That was not the reason you left; is that your answer?

In fact, Doctor, I think you told us in response to one of Mr. Finz' questions that you were fired from Philip Morris?

A That's correct.

Q That was on July 6th, 1984?

A Yes, it was.

Q We will come back to that in a minute. I want to

talk briefly about some of the things you did do.

Now, before you arrived at Philip Morris in 1976 there had already been a lot of work done by Philip

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Morris in helping to reduce the levels of tar and nicotine in cigarettes; is that correct?

A Yes, that's correct.

Q I think Mr. Kaczynski covered some of that with you.

He showed you a chart where the tar and nicotine or sales weighted average of tar nicotine and cigarettes fell fairly dramatically; remember that?

A Yes.

Q Philip Morris played, they did their part as far as reducing the tar and nicotine levels in cigarette over the years; didn't they?

A Yes, they did.

Q You also believed certainly at the time you worked at Philip Morris that reducing the levels of tar and nicotine was a good thing; isn't that right. Doctor?

A Not exactly correct. It was reducing the levels of tar while maintaining the level of nicotine.

Q You thought it was better to keep the level of nicotine higher and bring the tar down; is that what you are saying?

A Yes.

Q You would agree that reducing the level of tar is a good thing?

A Yes, absolutely.

Q Tar is the bad stuff and you told us a lot about that; right?

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A Right.

Q Now, when you worked at Philip Morris you worked under the assumption or under the hypothesis that if you reduced the levels of tar and smoke you would also reduce the level of possible carcinogens as well; is that correct?

A The assumption was based on test results.

In other words, the assumption was to be that if you reduce the level of carcinogens that there would be some reduction in the carcinogen potential of the cigarette. That is the assumption. Untested, but that is the assumption.

Q I think in response to some of Mr. Kaczynski's questions you covered a number of different ways that tar and nicotine levels would be reduced.

Nicotine basically follows tar; is that fair to say?

A No.

Q Well, on the chart that you saw it did follow

tar. If you reduce tar you reduce nicotine as well?

THE COURT: Sustained. That is a different basis of measurement.

Q Well, Doctor, you told Mr. Kaczynski a little bit about filtration. Remember that use of filters?

A Yes.

Q That is something you worked on while you worked at Philip Morris?

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A Correct.

Q A lot of hard working people, well qualified people also worked on filtration while you were at Philip Morris?

A They did.

Q And you also, I think, mentioned reconstituted tobacco. That is something you worked on while you were at Philip Morris?

A Yes.

Q And a lot of well qualified hard working people also worked on reconstituted tobacco, trying to improve the ways of making reconstituted tobacco while you were at Philip Morris; is that right?

A I'm not sure what you are referring to.

Q Did you try to improve the techniques that Philip Morris had with respect to reconstituted tobacco?

A Biggest project was trying to remove the nitrates which was not implemented.

MR. FINZ: Objection.

Q That was an improvement; is that correct?

MR. FINZ: Objection to the testimony that goes beyond 1969 with respect to Philip Morris unless we are now opening up the door.

THE COURT: Sustained.

Q Let me deal with just then.

There were a number of other issues you mentioned. Let me deal with two of them.

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Filters. Philip Morris have been using filters in their products since the early fifties?

A Correct.

Q Doctor, are you aware that Parliment cigarettes had filters on them in 1961 and 1962?

A Yes, I am.

Q And that is a good thing, wouldn't you agree, that Parliments had filters in 1961, 1962?

A It's good if you prove that it reduces the level of carcinogens to the point where there is dramatically reduced risk of cancer.

Q Would you agree a filtered cigarette is better than a non-filtered cigarette?

A Not in general.

Q If someone was going to smoke would you recommend they smoke a filtered cigarette or a non-filtered cigarette, assuming you inhale the cigarette?

A Depends on the cigarette. Some of the low tar filters are higher in the nitrosamines.

Q Would you agree that filters reduce the amount of tar and nicotine in cigarettes?

A I do.

Q By the way, you mentioned charcoal filters --

By the way, were you aware in the mid sixties Philip Morris introduced charcoal filters with the Parliment cigarette?

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A I was aware that Parliment had charcoal filters, yes.

Q We also talked about reconstituted tobacco.

Are you aware that the 1961 and 1962 Parliment cigarettes contained reconstituted tobacco?

A The early applications of the band cast process, yes.

Q Generally, that is a good thing to have reconstituted tobacco in a cigarette; isn't that right, Doctor?

A I think we have been all through that. Not any

better than having the stems alone. Better than not putting the stems back in the cigarettes.

Q It's better?

A I can agree it's better.

Q Thanks Doctor. Let me shift gears a little.

I heard you yesterday and you said that one of the ways that a cigarette could have been made safer either in the fifties or sixties was if you went back to the way a cigarette was made before World War I?

A Correct.

Q And I think I heard you answer Mr. Kaczynski's question your reason for that is because the cigarettes that were made before World War I were not inhalable?

A That was one of the reasons I gave.

The basic fact has to do with the onset of the relationship between lung cancer and smoking about

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1919. That is the very beginning of it and then moving forward from there.

Before the advent of large scale mass production of cigarettes there were larger -- aerosol, bigger pH higher, more difficult to inhale cigarette.

Q Doctor, are you suggesting that Philip Morris and the other tobacco companies threw away eighty years of progress and go back?

THE COURT: Sustained.

Q Doctor, do you know --

THE COURT: The issue is whether it is progress. You may define it as.

Q I'm asking you, Doctor Farone, do you know of any reputable scientist or any reputable organization that has ever advocated going back to making cigarettes the way they were made prior to 1919?

A If they knew they couldn't be inhaled they would recommend it with great fervor, yes.

Q You don't know of anybody who has already recommended that?

A I don't think they are aware of the fact you couldn't inhale them.

Q Is it fair to say the only person who recommended that is Doctor William Farone?

A No. A non-inhalable cigarette, I think, it's been recommended many times.

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Q Do you know of anyone other than you, Doctor Farone, who has recommended going back to cigarettes the way they were manufactured prior to 1919?

A Several people, yes.

Q Do you know of any published papers on the subject?

A No.

Q You certainly never published a paper on the subject?

A That's true.

Q Ever write it in a memo or document suggesting it to anyone at Philip Morris while you were there?

A Yes. Doctor David Lois (ph) recommended and I sponsored the idea of the non-inhalable cigarette.

We actually set up a project to make a cigarette you couldn't inhale.

MR. FINZ: Make a cigarette what?

THE WITNESS: You could not inhale.

Q That was a responsible thing for Philip Morris to do, to act on an idea you had?

A It would have been more responsible --

MR. FINZ: Excuse me, Judge.

MR. QUIGLEY: Can we have the question read back?

THE COURT: I would allow it.

MR. FINZ: There was an interruption.

THE COURT: Let's go on.

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Q You talked about King Sano cigarettes; is that correct?

A That's correct.

Q Kings Sano cigarettes were commercially available in the fifties and sixties?

A Nineteen 1954 to -- '54 to '56, I believe.

Q And where did you learn about King Sano cigarettes?

A Television.

Q From an advertizement you thought?

A Ralph Bellamy (ph), The Mystery Hour.

Q That was in the fifties?

A Yes.

THE COURT: Oh boy.

Q That was well before you got to Philip Morris correct?

A That's correct.

Q Doctor, by the way, do you know who manufactured King Sano?

A No, I don't recall.

Q If I told you it was a U.S. Tobacco Company would that ring a bell?

A Sounds right. I don't know for sure.

Q Do you know whether Kings Sano was still on the market in 1961 or 1962?

A I don't think so.

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25 Q Do you have any reason to dispute the fact that

King Sano was still on the market in 1961 or 1962?

MR. FINZ: Objection as to form.

THE COURT: I'll allow it.

MR. FINZ: Do you have any reason?

A I don't know when they were taken off the market.

THE COURT: Let's go on.

Q Doctor, you don't have any evidence that Clyde Anderson was interested in smoking King Sano cigarettes?

THE COURT: Sustained.

Q Do you?

THE COURT: Sustained.

Q They were available at the time for the consuming public? If somebody wanted a King Sano they could have bought one in that time period?

MR. FINZ: What time period?

THE COURT: 1961.

Q 1961, 1962.

MR. FINZ: Objection. There has been no answer to that question.

THE COURT: I know. You'll produce the places where it was available, etc.

Q Doctor, let me talk a little about exhibit 701.

THE COURT: If you choose to.

MR. QUIGLEY: I think I'll move on, your

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Honor.

Q I want to talk to you a little about exhibit 701, the 1961 Tobacco and Health R & D Approach presentation by Doctor Wakeham. Do you recall that document? It's in evidence.

MR. QUIGLEY: Can we put it on the screen?

A I recall.

Q Doctor, you went through this document with Mr. Finz and we looked at a couple of pages.

Would you consider this document to be a plan or a recommendation for a course of action by Doctor Wakeham? Would that be fair to say?

A Part of his recommendations for future work, yes.

Q That is what he was doing in exhibit 701? He was making a recommendation of what Philip Morris ought to do in the future?

A Doing that and also demonstrating the state of the art with what was known.

Q You say what was known.

What was known was also known by the medical and scientific community at that time; is that right?

A Apparently not.

Q Well, let's look at some of these things.

Mr. Finz showed you this page, evidence

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linking cancer and tobacco. Do you recall that?

A Yes.

Q Doctor, was it known in 1961 there was statistical evidence that certain diseases are more prevalent among smokers than non-smokers?

A Yes.

Q That was the studies you talked about Wynder, Graham, Doll and Hill?

A Yes.

Q Was it also known in 1961 that there had been certain tests where smoke condensates or extracts or compounds had known to increase tumor frequency?

A Yes.

Q Those are the mouse-skin painting tests he was referring to; right? Those were public?

A Yes. There are other kinds. This isn't just related to mouse-skin.

Q What he is referring to here, we can agree, can we not, that in 1961 it was fairly well known that there had been mouse-skin painting tests?

A Yes.

Q That have been conducted?

A Yes.

Q This is not a secret.

Next page is headed Problem of Carcinogen Identification.

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THE COURT: You're starting to testify.

MR. QUIGLEY: I'm sorry, it's late.

Q Problem of Carcinogen Identification. See that page?

A Yes.

Q On that page Doctor Wakeham cites, quoting, two public documents; is he not?

On the top J.P. Greenstein, Biochemistry of Cancer; is that accurate?

A Yes, he is quoting.

Q On the bottom at least, referencing Hartwell, Survey of Compounds, which have been tested for carcinogenic activity; is that right?

A Correct.

Q Those were both publicly available documents; is that correct?

A Correct.

Q Doctor Wakeham's study also submitted a partial list of compounds in cigarette smoke also identified as carcinogens. Do you see that?

A Yes.

Q That was also publicly available in 1961; is that

right?

A It was available in the scientific literature.

Q In fact, Doctor, in 1963, Philip Morris submitted a list similar to this one to the Surgeon General Advisory

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Committee. Are you aware of that?

A I believe I am, yes.

Q Philip Morris didn't try to keep any of this a secret?

MR. FINZ: Objection.

THE COURT: Sustained.

Q Doctor, I would like to turn to the next page.

Talks about cancer promoting agents in cigarette smoke. See that?

A Yes.

Q That is a quote from an article in the British Journal of Cancer in 1959?

A Yes.

Q That was also available in the scientific literature prior to 1969; is that correct?

A That's correct.

Q We will get closer to Doctor Wakeham's conclusion.

R & D program leading to a medically acceptable cigarette. Do you see that?

A I do.

Q Doctor Wakeham says,"present knowledge and current research indicate three main approaches."

"Number one. Reduction of irritating factors in smoke.

"Number two. Controlled nicotine in filler and smoke.

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"Three. Reduction of the general level of carcinogenic substances in smoke paren but without complete elimination of more than a few specific compounds."

See that?

A No, I don't see. I can't see.

Q I'm sorry?

A Yes.

Q Doctor, were those reasonable recommendations for Doctor Wakeham to have made in 1961?

A Yes.

Q Doctor, the next page talks about reduction of irritating factors in smoke. See that?

I'm not going to read it to save some time.

Reduction of irritating factors in smoke.

My questioned, Doctor, is whether Doctor Wakeham's recommendation concerning reduction of irritating factors in smoke was also a reasonable recommendation in

1961?

A Not based on what we know now.

Q Of course. Going back to 1961. In 1961 that was a reasonable thing for Doctor Wakeham to recommend; don't you agree?

A Only under the assumption that you want people to inhale the products. So, if you make the assumption that you're supposed to inhale this product then it's reasonable.

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Q We just talked about cigarette that are inhaled, the 1919 cigarette that can't be inhaled.

Would you agree that most people who smoke inhale cigarette?

A I can agree with that.

Q Most people who buy commercial cigarettes buy them so they can inhale them?

A Yes. They don't have a choice on that, I don't think.

Q Just about everybody?

A Well, there's no choice.

Q Doctor, let me go to Doctor Wakeham's conclusions. Some possible ways to reduce carcinogens in tobacco smoke. See that?

A Yes.

Q Doctor, do you think it was a good thing in 1961 for Doctor Wakeham to recommend each of those five items that we show up on the screen?

A Yes, I do.

Q It's a responsible thing for him to do at that time; is that right?

A Yes.

Q Let me go to the last page the summary.

Bottom part says,"a medically acceptable low carcinogen cigarette may be possible. Its development would require time, money and unfaltering determination." See that?

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A Yes.

Q Fifteen years later when you joined the company in 1976 did you invest time in attempting to develop a medically acceptable low carcinogen cigarette?

A I don't think we were looking to make it --

Yes, low carcinogen. Absolutely.

Q Fifteen years later when you joined Philip Morris in 1976 did Philip Morris spend money trying to develop a medically acceptable low carcinogen cigarette?

A Yes.

MR. FINZ: We are now beyond 1969.

MR. QUIGLEY: When he was with the company,

Judge.

MR. FINZ: He said in 1976.

THE COURT: Sustained.

Q By the way, Doctor, you were not with the company in'62,'63,'64,'65. You were in school at that time; is that right?

A No. I left in 1964. In '65 I was teaching.

Q Would it be fair to say, Doctor, when you were with the company in 1976 the people in your group were determined to do the best they could to try and develop a safer cigarette?

A No.

THE COURT: Sustained. We are past 1969. I don't want to hear an answer to it.

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Strike everything past 1969.

MR. QUIGLEY: Just about done.

Q Doctor, I think you touched on this a few moments ago.

You left July 6th, 1984; is that right?

A That's correct.

Q Let me back up a little bit to 1983.

You were the Director of Applied Research at that time; is that right?

A That's correct.

Q Your boss was Doctor Max Hausermann; correct?

A That's correct.

Q Doctor Hausermann was the head of the Research and Development Department at Philip Morris at that time?

A Correct.

Q And in 1983 Doctor Hausermann announced that he would be stepping down as head of the Research and Development Department; is that correct?

A That is correct.

Q In 1983, you, as one of the five directors in the Research and Development Department were a candidate to succeed Doctor Hausermann; is that right?

A More than that.

Q You were probably the leading candidate?

A Actually announced through Doctor Hausermann I would succeed Doctor Hausermann.

Q It was announced not only to you personally, but

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in front of a group of your peers?

A The other directors.

Q You felt Philip Morris made a commitment to you to promote you to the head of the Research and Development Department; is that fair to say?

A Actually before that time I asked Doctor Hausermann not to say that, but he said he was ordered to

do that by Mr. Wallace McDowell (ph).

Following the order he did that despite my express desire to not have such a thing stated.

Q It was stated nonetheless?

A Certainly was.

Q You were happy about the anticipated promotion; is that true?

A I looked forward to making some changes, yes.

Q In fact, you and your wife bought a big house in Richmond at that time?

A No, that is not true.

Q Roughly around the same time did you buy a house in Richmond?

A No. My wife was promised a -- she bought the house. I do not own any of the house.

Q You lived with your wife?

A I did, but she bought the house. We had a prenuptial agreement that said all the property is in her name.

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Q You moved in and you got to use the bedroom and the bathroom and the kitchen?

A That's correct, but it's her house.

Q Her house, all right.

Doctor, in June of 1984 you found out that

you were not going to be promoted; is that right?

A I found that out after my wife was told she wasn't going to get promoted and she filed a complaint against the company with the Equal Employment Opportunity.

Q Was that about June of 1984?

A Yes.

Q Now, your wife -- by the way, she was denied a promotion also?

A She was denied it before mine.

Q She filed a claim against the company; is that correct?

A That is correct.

Q In fact, at the time she filed her claim you tried to talk her out of it, you were afraid it might come back against you?

A How prophetic.

Q Is that a yes?

A Yes, that's correct.

Q No one in authority at Philip Morris ever told you that the reason why you didn't get that promotion was because your wife filed a claim; is that fair to say?

A I'm not sure of that. My boss, Doctor Hausermann,

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told me when I asked why I didn't get the promotion, he said go find yourself an attorney because I can't advise

you.

I went and got an attorney. When I told my boss that I got the attorney I was terminated for insubordination for consulting with an attorney.

Draw what you want from that. Those are the facts.

Q In fact, not only did you retain an attorney, but you wrote a letter or a memo rather to Doctor Hausermann that is dated June 26, 1984?

A Correct.

Q Could I show you a memo from W.A. Farone to M. Hausermann, June 26th, 1984 and ask you if you recognize that document?

A That is the one I wrote.

Q That is your signature?

A Yes, it is.

MR. QUIGLEY: Could I give this to Mr. Finz?

MR. FINZ: Sure.

MR. QUIGLEY: Any objection?

MR. FINZ: To what?

MR. QUIGLEY: Moving it into evidence.

MR. FINZ: No objection to this, your Honor.

MR. QUIGLEY: Can we put it on the screen?

THE COURT: Yes.

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Q This is an excerpt that we see on the screen from your letter or memo to Dr. Hausermann, dated June 26, 1984; correct?

A Correct. Personal and confidential letter to Doctor Hausermann, yes.

Q If you would let me read the excerpt. The first sentence of your letter, "this is to advise you that on June 25, 1984 I retained an attorney for the purpose of taking whatever legal actions are necessary to protect my career from what I perceive as discriminatory treatment."

Those are your words; right, Doctor?

A Correct.

Q It goes on to say, "as we discussed I believe that promises made to" --

A I don't have it.

Q Let me give you my copy. It's a little difficult to read?

A It is tiny. I can't read it.

Q Can you follow me now?

A Yes.

Q Your letter goes on to say, "as we discussed, I believe that promises made to me by senior management were not kept and that the major reason for this was my wife's complaint against the company."

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Those are your words; are they not?

A Those are my words.

Q When you used the word "complaint" in this memo you were referring to the filing of a lawsuit; were you not?

A I don't think an EEOC complaint, is that a lawsuit?

Q I'm sorry?

A Is an EEOC a complaint? She filed a complaint with the equal opportunity.

Q I'm not talking about your wife's complaint. Let me go back to the statement.

Says, "I have instructed my attorney to file a complaint, but not to file it pending your return from vacation and your advice on how to proceed, i.e., your determination with senior management on our ability to negotiate a mutually satisfaction solution."

A I'm saying I'm being treated discriminatorily because my wife is terminated and she is told she isn't going to get a promotion. I'm told after she is told that she files a complaint. And I'm told I'm not going to get my promotion.

In my belief when I wrote this letter, to this day my belief is that I was terminated because of my

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wife's complaint.

My complaint can only be filed, as I was advised, with the Equal Employment Opportunity Commission.

I was over forty and I was going to go back and say, okay, I'm being terminated for two reasons. One is because of my wife's complaint. And secondarily, because I'm over forty.

Q I think I misspoke. I thought I had the other part of the letter up there.

This is also in your letter what we see on the screen. That is a little beneath what we talked about earlier.

This is where you talk about your complaint?

A Yes.

Q When you use the world "complaint" you were talking about a legal proceeding; right?

A No.

Q You don't believe the EEOC is a legal proceeding?

THE COURT: He is not a lawyer.

Q You were threatening to take legal action against the company; is that right?

A I was going to file an EEOC complaint.

Q Not only did you write this letter to Doctor Hausermann, you also told a number of your coworkers at

Philip Morris you were going to sue the company if you didn't get a promotion; isn't that right?

A Not true.

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Q You didn't tell anybody?

A I didn't tell anybody I was going to sue the company for anything. Because at Doctor Hausermann's suggestion, retaining the attorney, I presume what was going to happen. I was willing to leave the company so I knew what was going to happen. I was going to be terminated.

I simply told some people that most likely I will be terminated because I'm going to possibly have to file an EEOC complaint, not sue the company.

Q You did tell other workers; is that right?

A I'm trying to remember who I may have told. I could only think of two who I may have told.

Q Two people who worked at Philip Morris at the time you worked there; is that right?

A Two people who I worked with.

Q With. Two of your coworkers?

A Not people who worked for me.

THE COURT: Counsel.

Q It would not be unreasonable for Philip Morris to interpret this letter --

MR. FINZ: Objection.

Q -- As a threat?

THE COURT: Sustained.

Q After you sent this letter to Doctor Hausermann you were called into a meeting, were you not, with Barry

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Case, who was in the Human Resources Division?

A Yes, I was.

Q And Doctor Hausermann was also there?

A He was called back from his vacation, that is correct.

Q By the way, Doctor, were you told that there was a change in management and that is why you didn't get the promotion that you thought you'd been promised?

THE COURT: Sustained.

Q Was there a Mr. Remmington (ph) who came down and announced to you there was a change in management? Does that ring a bell?

A I'm not --

THE COURT: Counsel, come on. That is not relevant.

MR. QUIGLEY: I think it is.

Q In this meeting on July 6th, 1984 Mr. Case read a statement to you; is that right?

A Which I never received a copy of until these

proceedings. Yes, he did.

Q Since you started testifying against the tobacco companies you have seen a copy of that statement?

A I have, yes.

Q Let me show you a document which is a one-page typewritten statement. And ask you if that is the statement that Barry Case read to you?

A Well, I don't remember the statement that he read

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to me. This has been put in evidence by the tobacco company as what he read to me.

Q Does it look familiar to the statements you heard read to you on July 6th, 1984?

A I didn't realize he was reading a statement. I think I testified to that before.

MR. QUIGLEY: I would like to move this into evidence.

MR. FINZ: Objection.

THE COURT: May I see it?

(Short pause.)

THE COURT: Denied.

MR. QUIGLEY: Excuse me?

THE COURT: Denied.

Q Doctor Farone, do you remember Mr. Case saying to you in words or in substance to you on July 6th--

MR. FINZ: Objection.

THE COURT: Aside from the fact that he announced that you're being terminated.

MR. QUIGLEY: The reasons are critically important, are absolutely critically important.

THE COURT: At least you think so.

MR. QUIGLEY: May I approach?

THE COURT: Yes.

MR. QUIGLEY: Outside the presence of the jury.

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THE COURT: Let's go. You're not joining me?

MR. FINZ: I'm sorry, I didn't hear you, Judge. Forgive me.

THE COURT: You are forgiven.

(Discussion held at the bench, off the record.)

THE COURT: You didn't leave happy with the company; did you, Doctor?

You weren't a happy camper?

THE WITNESS: I expected to be terminated because from the time my wife filed the complaint--

THE COURT: You weren't surprised but you

weren't happy?

THE WITNESS: I wasn't happy the way they did it. I didn't mind going. I minded the way they did it.

Q You were upset when you had that meeting with Mr. Case and Doctor Hausermann; is that fair?

A I was shocked at the way it was handled, yes, absolutely shocked.

Q You also said something to Doctor Hausermann in Latin; did you not?

A I absolutely did.

Q You know where I'm going; don't you?

By the way, Doctor, you are a fan of classic

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literature?

THE COURT: The only ones that don't know this are the two of us.

Q You are a fan of classic literature; are you not?

A Yes, I am.

Q And Doctor Hausermann also enjoyed classic literature?

A True.

Q You and Doctor Hausermann would communicate with each other from time to time?

A From time to time. We were trained in a little

Latin.

Q You send something to Doctor Hausermann in Latin?

A Yes, I did.

Q Let me put it on the screen.

Tell the jury what de alea jacta est means?

A It's a Roman soldiers used to gamble a lot. They invented --

Q Just translate.

A It's important to understand what it means.

Q I'll ask you for a literal translation. Does it mean the die is cast?

A That is a literal translation.

Q That is the literal translation?

A Not what it means.

Q You didn't just make that phrase up; did you?

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A No, I didn't.

Q That is a very famous phrase from classic literature?

A Yes.

Q Uttered by Julius Cesear while he was crossing the Rubicon River what was then --

MR. FINZ: Objection to all of this.

I object to Julius Cesear at five after six.

MR. QUIGLEY: Almost done, Judge.

May I proceed?

THE COURT: I remember this phrase from school. Okay.

Q When Julius Cesear crossed the Rubicon River he uttered the phrase de alea jacta est or the die is cast?

A Yes. Do you know what it meant?

Q When Julius Cesear crossed the Rubicon River he had an army mobilized with him.

MR. FINZ: Objection.

THE COURT: Sustained.

Q Doctor Farone, when Julius Cesear uttered the phrase de alea jacta est or the die is cast he meant it as a declaration of war on his enemies; did he not?

MR. FINZ: Objection.

A Absolutely not.

MR. FINZ: Don't answer. I have an objection.

THE COURT: Sustained.

Q Prior to that time the Romans were allies of

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Cesear; were they not?

MR. FINZ: Objection.

THE COURT: Come on.

Q When you uttered the phrase de alea jacta est, you meant that as a declaration of war on Philip Morris?

A I did not. Absolutely not. How am I going to

fight?

Q How are you going to fight Philip Morris? Let's talk about that.

THE COURT: Let's not talk about it.

Sustained as to what he meant. The words speak for themselves. When we get Latin scholars in here -- stop interpreting. Let's go on.

Q Doctor, within a few months after you were fired you and your wife left Richmond; is that right?

A No.

Q How long was it?

A I left within one or two months. My wife joined me, I think, approximately eight months later.

Q Today at the current time you spend probably fifteen percent of your time testifying against the tobacco companies; is that fair to say?

A From 1994, end of 1993, when I was contacted by the Food and Drug Administration.

Q Yes or no. Is that ten to fifteen percent of your time?

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THE COURT: Since 1994.

Q Since 1994.

THE COURT: And for the ten-year period before that.

A I didn't know anything about. I kept up with the technology. I was not in contact with anybody at any cigarette company.

Q All of the testimony you have given has been on behalf of Plaintiffs who are suing Philip Morris and the other tobacco companies; is that right?

A No.

Q You never testified on behalf of tobacco companies in the last four years?

A Never been asked the way it started.

Q Thank you.

A I gave evidence to the Food and Drug Administration.

Q Please.

THE COURT: Plaintiffs are not the FDA.

Q You testified in at least thirteen cases, not including this one, on behalf of plaintiffs now. I'm only talking about plaintiffs who are suing tobacco companies.

A Probably correct.

Q You've given depositions in the Moore case, the Arch case, Widdick case, Washington Attorney General case, Whipple case, the Memphis Consolidated Cases, the Neri case, the Bolling case, Whiteley case, just last week, the

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Blue Cross and Blue Shield case, Little case the Simon case

and White case; is that right?

A You forget Florida case, Texas case.

Q You've also testified six times at trial; is that right?

A Yes, I have.

Q By the way, do you currently charge the Plaintiffs for your time?

A I started doing that recently, yes.

Q How much do you charge in nowadays?

A We figured my company, it's not me that is charging.

Q You own a company?

A No, I don't own.

Q You own part?

A Fifty percent. My associate who owns the other fifty percent found I was spending too much time to do this as a public service. We had originally agreed five to ten percent of my time. Recently I'm being reimbursed for testimony and depositions and travel expenses.

Q What rate?

A Two hundred and fifty dollars an hour.

Q Until recently you used to testify against the tobacco companies on behalf of Plaintiffs, as you said, for a public service?

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A That's correct.

Q You didn't need any money, just testifying against your own pal Philip Morris was award enough?

MR. FINZ: Objection.

THE COURT: You don't expect that not to be sustained.

MR. QUIGLEY: No further questions.

THE COURT: Come on.

MR. QUIGLEY: It's ten after six.

THE COURT: Counsel.

MR. FINZ: One minute.

REDIRECT EXAMINATION

BY MR. FINZ:

Q How long did your wife work for Philip Morris?

THE COURT: By the way, this trial is not --

Q How long did your wife work for Philip Morris?

A Nineteen years.

Q Was she fired?

A Essentially, she was told she wasn't going to get promoted.

Q How long did you work at Philip Morris?

A Eight years.

Q Anything you said under oath, sir, under the penalties of perjury to this jury?

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MR. QUIGLEY: Objection to the form of the question.

THE COURT: Anything you've testified to this jury. You may continue.

Q False?

A No.

MR. QUIGLEY: Objection.

THE COURT: I'll allow it. Valid.

MR. FINZ: I have nothing further, Judge. Thank you.

That was less than six.

THE COURT: Particularly with your cross.

Counsel?

MR. KACZYNSKI: No questions.

MR. SHEFFLER: No questions.

THE COURT: Juror number one, please remain there.

The rest of you, I'll see you tomorrow morning at 9:45. I'm going to make it ten o'clock.

(The jury leaves the courtroom, except for juror number one.)

THE COURT: Juror number one, I want to thank you. I would like to move the trial along. By

consent I'm going to excuse you. I want to thank

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you.

Understand that rather than break for a day, because I'm looking at another three weeks of this, that is why I have all these alternates. So thank you again.

Tomorrow morning, as soon as the parties are here at ten o'clock. I'm going to give Miss Stevens another few minutes.

One other thing I want to say.

MR. QUIGLEY: May we say thank you?

MR. FINZ: May we express our thanks?

THE COURT: You could talk to these folks if you would like.

(Juror number one leaves the courtroom.)

THE COURT: I'm going to solve this problem forever.

No witness will take the stand on behalf of the Plaintiff after tomorrow morning unless that twenty-four hour notice has been complied with to the minute.

There will be no further faxing. It will be handed to you in this court only. I'm not going to have any more I sent it and I didn't get it.

It will be put on the record when you get it.

This will be done both for the witnesses in seventy-two hours exactly before their anticipated arrival on the stand and the exhibit will be

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exactly twenty-four hours.

A witness will be precluded from the stand if that is not taking place.

I have bent the rules sufficiently.

MR. KACZYNSKI: Could I put on the record what happened here today?

THE COURT: Go right ahead.

MR. KACZYNSKI: We received, we got a dispute about whether it was a quarter after five or 4:40.

MR. FINZ: May I be excused? I must hit the john.

THE COURT: I prefer you stay here so you could hear this.

MR. FINZ: I'm being called by nature. I must leave.

THE COURT: Then we will wait until you arrive back.

MR. FINZ: Thank you.

(A short break is taken.)

THE COURT: This is my order:

There will be no witness on the stand unless it is handed over in this court. I'm not interested in faxing or anything else. It will be done right here.

MR. KACZYNSKI: What about weekends when the

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twenty-four hours --

THE COURT: If you want to have a discussion about documents, we have it Friday. Bring it up if you don't want to break up the flow.

MR. LONDON: We do. We bring it up before court starts. You know what comes up, every document is objected to.

THE COURT: So then once I'm past the business record rule there is no more objections other than my rulings.

MR. LONDON: Great.

THE COURT: Just understand, I'm not going to rule out anymore until it is on the record here that it has been handed over and receipt acknowledged by one of the defendants. This is nonsense.

Now, you want to make a statement on the record? Go ahead.

MR. KACZYNSKI: In the three principal witnesses who have been called to testify so far, for Doctor Feingold they designated approximately 425 exhibits. I don't have the precise number of how many they used. My recollection is it's somewhere.

THE COURT: The question is when they did it was it within twenty-four hours?

MR. KACZYNSKI: No, your Honor.

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130 for Doctor Farone almost, close enough for government work. 210 for Doctor Cummings, about eight hours later. Not any eight hours later, but the evening before he is supposed to testify.

THE COURT: Have a pleasant evening.

If you cannot get a reasonable night sleep, Miss Stevens, you will give me the numbers you've been unable to do and we will hold those up, but within reason with best efforts.

MS. STEVENS: Thank you, your Honor.

(Whereupon, the trial was adjourned to May 17, 2000.)

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